

REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE,

AND

THE LORDS

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ON

APPEAL FROM THE SUPREME AND SUDDER DEWANNY
COURTS

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ.,

BARRISTER AT LAW.

VOL. III.

1841-46.

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LIST
OF THE
JUDICIAL COMMITTEE

OF
HER MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., c. 41,
FOR HEARING AND REPORTING ON PETITIONS AND APPEALS,
TO HER MAJESTY IN COUNCIL.

1841—1846.

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The Duke of *Buccleuch*, late Lord President.
The Duke of *Portland*, formerly Lord President.
The Earl of *Harrowby*, formerly Lord President.
Lord *Wharncliffe*, Lord President (since deceased).
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Lord *Brougham*, formerly Lord High Chancellor.
Lord *Denman*, Lord Chief Justice of the Queen's Bench.
Lord *Abinger*, Lord Chief Baron of the Exchequer (since deceased).
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Sir *James Parke*, Baron of the Exchequer.
Sir *John Bosanquet*, formerly Judge of the Common Pleas (since deceased).
Sir *John Vaughan*, formerly one of the Judges of the Common Pleas (since deceased).

LIST OF THE JUDICIAL COMMITTEE.

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Sir *Frederick Pollock*, Lord Chief Baron of the Exchequer.

Sir *Thomas Wilde*, Lord Chief Justice of the Common Pleas.

PRIVY COUNCILLORS, ASSESSORS.

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Sir *Alexander Johnstone*, formerly Chief Justice of Ceylon.

Sir *Edward Ryan*, late Chief Justice of Bengal.

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APPENDIX.

COSTS.

ORDER IN COUNCIL,

Dated the 11th of *August* 1842.

WHEREAS, there was this day read at the Board a representation from the Judicial Committee of the Privy Council, dated the 10th *August* instant ; and in the words following :— viz. “ The Lords of the Judicial Committee having taken into consideration the scale on which the costs of Appeals, and other matters referred by your Majesty to this Committee, are usually taxed by the Masters of the Court of Queen’s Bench, or other persons to whom your Lordships have, from time to time, referred the same ; their Lordships agree humbly to represent to your Majesty, that it is expedient that the scale of costs hitherto allowed in the said proceedings before this Committee, should be reduced ; and their Lordships recommend that, provisionally, and until further consideration, such costs, in all Appeals, or matters not being Appeals, from the Courts of Ecclesiastical or Admiralty Jurisdiction, should be taxed and allowed by all such taxing officers as shall hereafter be directed to ascertain and report the same to the Board, according to the Schedule hereunto annexed ; and that this rate of charges should be observed by Solicitors conducting business before this Committee.”

Scale of
Costs hitherto
allowed, to be
reduced ac-
cording to
schedule an-
nexed.

Her Majesty having taken this representation into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of what is therein recommended, and to order, as it is hereby ordered, that the same be duly and punctually observed, complied with, and carried into execution. Whereof all persons whom it may concern are to take notice, and govern themselves accordingly.

b

APPENDIX.

SCHEDULE OF FEES ABOVE REFERRED TO.

	£.	s.	d.
Retaining Fee	0	13	4
Perusing Official Copy of Proceedings	2	2	0
(This Fee to be raised at the discretion of the Clerk of Appeals.)			
Attendances at the Council Office, or elsewhere, on ordinary business, such as to enter an Appeal on an Appearance, to make a Search, to lodge a Petition or Affidavit, or to retain Counsel	0	10	0
Instructions for Petition of Appeal	0	10	0
Drawing Petition or Case, per folio	0	2	0
Drawing Appendix, per folio	0	1	0
Copying, per folio	0	0	6
Attendance on Order of Reference	Nil		
Drawing small Petitions for Orders, &c.	0	10	0
Instructions for Case	1	0	0
Attending Consultation	1	0	0
Correcting Proof Sheets, per printed sheet	0	10	6
Correcting Foreign or Indian Proof Sheets, per printed sheet	1	1	0
Attending on Setting down for Hearing	Nil		
Attending Clerk of Council for Order	Nil		
Attending at Council Chamber on a Petition	1	6	8
Attending Council Chamber all day on an Appeal not called on	2	6	8
Attending a Hearing	3	6	8
Attending a Judgment	1	6	8
Sessions Fee (for the legal year) equal to four Term Fees	3	3	0

RULE issued by the Judicial Committee, directing Judges of the Courts in the Colonies and Foreign Settlements of the Crown to give their reasons in writing for the Judgment appealed from ; and to transmit the same with the Record.

At the Council Chamber, Whitehall, the 12th of *February*
1845.

By the Judicial Committee of the Privy Council.

Whereas by an Act passed in the Eighth year of Her Majesty's reign, intituled, "An Act for amending an Act passed "in the fourth year of the reign of His late Majesty, entitled, *An Act for the better administration of Justice in His Majesty's Privy Council*, and to extend its jurisdiction and "powers," it was enacted, "that it should be lawful for the "Judicial Committee of the Privy Council to make any "general rule or regulation to be binding upon all Courts in "the Colonies, and other foreign settlements of the Crown, "requiring the Judge's notes of the evidence taken before "such Court on any cause appealed, and of the reasons "given by the Judges of such Court, or by any of them, for "or against the judgment pronounced by such Court, which "notes of evidence and reasons should by such Court be "transmitted to the Clerk of the Privy Council within one "calendar month next after the leave given by such Court to "prosecute any appeal to Her Majesty in Council, and such "order of the said Committee should be binding upon all "Judges of such Courts in the Colonies or Foreign Settlements of the Crown." Now, THEREFORE, the Lords of the said Judicial Committee of the Privy Council are pleased to order, as it is hereby ordered, that when any Appeal shall be prosecuted from any judgment of any Court in the Colonies or Foreign Settlements of the Crown, the reasons given by the Judges of such Court, or by any of such Judges, for or against such judgment, shall be, by the Judge or Judges

of such Court, communicated in writing to the Registrar of such Court, or other officer, whose duty it is to prepare and certify the transcript record of the proceedings in the cause, and that the same be by him transmitted in original to the Clerk of Her Majesty's Privy Council, at the same time when the documents and proceedings proper to be laid before Her Majesty in Council upon the hearing of the Appeal are transmitted.

Whereof the Judges of all such Courts in the Colonies or Foreign Settlements of the Crown are to take notice, and govern themselves accordingly.

C. C. GREVILLE.

Act 6th & 7th Vict., chap. 38.

An Act to make further Regulations for facilitating the hearing Appeals and other Matters by the Judicial Committee of the Privy Council.—[28th July 1843.]

Whereas it has been found expedient to make further Regulations for hearing and making report to Her Majesty in Appeals and other matters referred to the Judicial Committee of the Privy Council, and for the more effectual appointment of surrogates in ecclesiastical and maritime causes of appeal, and for making orders or decrees incidental to such causes of appeal, and for the punishment of contempts, and compelling appearances and enforcement of judgments, orders, and decrees of Her Majesty in Council, or of the said Judicial Committee, or their surrogates in such causes of appeal: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that Appeals, &c., in any appeal, application for prolongation or confirmation of letters patent, or other matter referred or hereafter to be referred by Her Majesty in Council to the Judicial Committee of the Privy Council, it shall be lawful for Her Majesty, by Order in Council or special direction under Her Royal Sign Manual, having regard to the nature of the said appeal or other matter, and in respect of the same not requiring the presence of more than three members of the said committee, to order that the same be heard, and when so ordered it shall be lawful that the same shall be accordingly heard by not less than three of the members of the said Judicial Committee, subject to such other rules as are applicable, or under this Act may be applicable, to the hearing and making report on Appeals and other matters by four or more of the members of the said Judicial Committee, may be heard, by not less than three members of the Judicial Committee of the Privy Council, under a special order of Her Majesty.

II. And be it enacted, that in respect of all incidents, emergents, dependents, and things adjoined to, arising out of, or connected with Appeals from any Ecclesiastical Court, or from any Admiralty or Vice-Admiralty Court, (save in and their surrogates in respect to

appeals from Ecclesiastical and Admiralty Courts. giving a definitive sentence, or any interlocutory decree having the force and effect of a definitive sentence,) the said Judicial Committee and their surrogates shall have full power, subject to such rules, orders, and regulations as shall from time to time be made by the said Judicial Committee; (with the approval of Her Majesty in Council,) to make all such interlocutory orders and decrees, and to administer all such oaths and affirmations, and to do all such things as may be necessary, or the Judges of the Courts below appealed from or their surrogates in the cases appealed, or the Judges of the Courts appealed to or their surrogates, or the Lords Commissioners of Appeals in prize causes or their surrogates, and the Judges delegate or their condelegates under Commissions of Appeal under the Great Seal in ecclesiastical and maritime causes of Appeal, would respectively have had before an Act passed in the third year of the reign of His late Majesty, entituled *An Act for transferring the powers of the High Court of Delegates, both in Ecclesiastical and Maritime causes, to His Majesty in Council*, and another Act passed in the following session of Parliament, entituled *An Act for the better administration of justice in His Majesty's Privy Council*, were passed.

2 & 3 W. 4. c. 92.

3 & 4 W. 4. c. 41.

Who to be surrogates and examiners of the Judicial Committee in Ecclesiastical and Admiralty Appeals.

III. And be it enacted, that the surrogates and examiners of the Arches Court of *Canterbury* and the High Court of Admiralty of *England*, and such persons as shall from time to time be appointed surrogates or examiners of the said Courts, shall be by virtue of this Act, surrogates and examiners respectively of the Judicial Committee of the Privy Council, in all causes of Appeal from Ecclesiastical Courts, and from any Admiralty or Vice-Admiralty Court.

Past proceedings of surrogates of the Judicial Committee valid, notwithstanding certain informalities.

IV. And be it enacted, that all orders, decrees, and things heretofore done and expedited, in such causes of Appeal, by the surrogates appointed by the said Judicial Committee of the Privy Council, shall be deemed to be valid and effectual, if otherwise lawfully done and expedited, notwithstanding any informality or want of authority in respect to the same, in the orders of His late Majesty in Council of the fourth day of *February* one thousand eight hundred and thirty-three, of the

said Judicial Committee of the fifth day of *February* one thousand eight hundred and thirty-three, of the order of His late Majesty in Council of the ninth day of *December* one thousand eight hundred and thirty-three, of an order of the said Judicial Committee of the tenth day of *December* one thousand eight hundred and thirty-three, and an order of His late Majesty in Council of the twelfth day of *August* one thousand eight hundred and thirty-five.

V. And be it enacted, that, subject to such rules and regulations as may from time to time be made by the said Judicial Committee with the approval of Her Majesty in Council, and save and in so much as the practice thereof may be varied by the said Acts of the reign of his late Majesty or by this Act, the said causes of Appeal to Her Majesty in Council shall be commenced within the same times, and conducted in the same form and manner, and by the same persons and officers, as if Appeals in the same causes had been made to the Queen in Chancery, the High Court of Admiralty of *England*, or the Lords Commissioners of Appeals in prize causes respectively ; and all things otherwise lawfully done and expedited in the said causes of Appeal by the Registrar of the High Court of Admiralty of *England*, his deputy or deputies, in consequence of the passing of the said Acts of the reign of His late Majesty, shall be deemed to be valid to all intents whatsoever.

Manner of
conducting
Appeals
before the
Judicial
Committee.

VI. And whereas by the provisions of the hereinbefore secondly-recited Act it was enacted, that the said Judicial Committee should have and enjoy in all respects, such and that same power of punishing contempts and of compelling appearances, and that His Majesty in Council should have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders, (both *in personam* and *in rem*,) as are given to any Court Ecclesiastical by an Act of Parliament passed in a session of Parliament of the second and third years of the reign of His Majesty King *William* the Fourth, intituled *An Act for enforcing the process upon contempts in the Courts Ecclesiastical of England and Ireland*, and that all such powers as are given to Courts Ecclesiastical,

So much of
2 & 3 *W.* 4.
c. 93, as
empowers
the Judicial
Committee
and His
Majesty in
Council
to punish
contempts,
&c., repealed.

or persons who may be ultimately entitled thereto, or for payment thereof to the person to whom the same may be lawfully due.

All Appeals from Ecclesiastical and Admiralty Courts may be referred to the Judicial Committee by an Order in Council.

XI. And be it enacted, that it shall be lawful for Her Majesty, by order in Council, to direct that all causes of Appeal from Ecclesiastical Courts, and from the Vice-Admiralty Court of the *Cape of Good Hope*, and all Vice-Admiralty Courts to the westward thereof, in which the Appeal and Petition of Reference to Her Majesty shall have been lodged in the Registry of the High Court of Admiralty and Appeals, within twelve calendar months from the giving or pronouncing of any order, decree, or sentence appealed from, and all causes of Appeal from Vice-Admiralty Courts to the eastward of the *Cape of Good Hope*, in which the Appeal and Petition of Reference to Her Majesty shall have been lodged in the Registry of the High Court of Admiralty and Appeals, within eighteen calendar months, from the giving or pronouncing any order, decree, or sentence appealed from, shall be referred to the Judicial Committee of the Privy Council, and the said Judicial Committee and their surrogates shall have full power forthwith to proceed in the said Appeals, and the usual inhibition and citation shall be decreed and issued, and all usual proceedings taken, as if the same had been referred to the said Judicial Committee by a special order of Her Majesty in Council in each cause respectively.

Costs may be awarded by the Judicial Committee, and taxed.

XII. And be it declared and enacted, that as well the costs of defending any decree or sentence appealed from as of prosecuting any Appeal, or in any manner intervening in any cause of Appeal, and the costs on either side, or of any party, in the Court below, and the costs of opposing any matter which shall be referred to the said Judicial Committee, and the costs of all such issues as shall be tried by direction of the said Judicial Committee respecting any such Appeal or matter, shall be paid by such party or parties, person or persons, as the said Judicial Committee shall order, and that such costs shall be taxed as in and by the said Act for the better administration of justice in the Privy Council is directed respecting the costs of prosecuting any Appeal or matter refer-

red by Her Majesty under the authority of the said Act, save the costs arising out of any ecclesiastical or maritime cause of Appeal, which shall be taxed by the Registrar hereinafter named, or his Assistant Registrar.

XIII. And be it enacted, that the Registrar of the High Court of Admiralty of *England* for the time being may be appointed by Her Majesty to be Registrar of Her Majesty in ecclesiastical and maritime causes, and shall have power to appoint an Assistant Registrar, as provided by an Act passed in the fourth year of the reign of Her Majesty, intituled *An Act to make provision for the Judge, Registrar, and Marshal of the High Court of Admiralty of England*, and shall during his good behaviour, and while he shall be Registrar of the said High Court of Admiralty, hold his office of Registrar of Her Majesty in ecclesiastical and maritime causes, and shall do all such things, and shall have the same powers and privileges in respect to the same, as belong to his predecessors in the office of Registrar of His Majesty in ecclesiastical and maritime causes.

Appointment of Registrar and Assistant Registrar in ecclesiastical and maritime causes.
3 & 4 Vict., c. 66.

XIV. And be it enacted, that all records, muniments, books, papers, wills, and other documents remaining in the Registry of the High Court of Admiralty and Appeals, appertaining to the late High Court of Delegates and Appeals for prizes, shall be and remain in the custody and possession of the said Registrar of Her Majesty in ecclesiastical and maritime causes.

Custody of records, &c., of the Court of Delegates and Appeals.

XV. And be it enacted, that it shall be lawful for the said Judicial Committee from time to time to make such rules, orders, and regulations respecting the practice and mode of proceeding in all Appeals from Ecclesiastical and Admiralty and Vice-Admiralty Courts, and the conduct and duties of the officers and practitioners therein, and to appoint such officer or officers as may be necessary for the execution of processes under the said Seal of Her Majesty, and in respect to all Appeals and other matters referred to them, as to them shall seem fit, and from time to time to repeal or alter such rules, orders, or regulations: Provided always, that no such rules, orders, or regulations shall be of any force or effect

Judicial Committee empowered to make rules, &c., respecting practice and mode of proceeding in Appeals, &c.
Proviso

until the same shall have been approved by Her Majesty in Council.

Judicial
Committee
of Privy
Council to
proceed
with causes
depending
before late
High Court
of Delegates.

XVI. And whereas, in certain causes which were depending before the late High Court of Delegates, certain decrees or orders were made and interposed, and are not yet fully carried into effect : and whereas, in consequence of the death of the Judges Delegate, or some of them, named in the several commissions under the Great Seal, such decrees or orders cannot be carried into effect ; be it enacted, that all such causes of Appeal and complaint which were depending before the High Court of Delegates, and in which any decree, order, or thing, for the reason lastly hereinbefore mentioned, is outstanding and not fully ended and determined, shall be transferred to the Judicial Committee of the Privy Council ; and the said Judicial Committee shall take up and proceed with the said causes in the same manner as if the same had been originally causes of Appeal and complaint depending before the said Judicial Committee.

Definition of
terms.

XVII. And be it enacted, that in this Act all words denoting a male person shall be taken to include a female also, and all words denoting one person or thing shall be taken to include also several persons or things, unless a contrary sense shall clearly appear from the context ; and that the words “ Arches Court of *Canterbury*,” used in this Act, shall be construed to extend to such Court as shall exercise the jurisdiction of the said Court or be substituted for the same ; and that wherever the words “ Ecclesiastical Court ” have been used in this Act, the same shall be construed to extend to such Court as shall exercise the jurisdiction or any part of the jurisdiction exercised by any Ecclesiastical Court or be substituted for the same ; and the words “ Ecclesiastical and Maritime Cause of Appeal ” shall be construed to extend to causes appealed from Ecclesiastical Courts and such Courts as shall exercise the jurisdiction or any part of the jurisdiction exercised by any Ecclesiastical Court, or be substituted for the same.

Act 7 & 8 Vict., chap. 69.

An Act for amending an Act passed in the Fourth Year of the Reign of His late Majesty, intituled An Act for the better Administration of Justice in His Majesty's Privy Council ; and to extend its Jurisdiction and Powers.—[6th August 1844.]

Whereas the Act passed in the fourth year of the reign ^{3 & 4 W. 4. c. 41.} of His late Majesty, intituled *An Act for the better Administration of Justice in His Majesty's Privy Council*, hath been found beneficial to the due administration of justice : and whereas another Act, passed in the sixth year of the said reign, intituled *An Act to amend the Law touching Letters Patent for Inventions*, hath been also found advantageous ^{5 & 6 W. 4. c. 83.} to inventors and to the public : and whereas the Judicial Committee acting under the authority of the said Acts hath been found to answer well the purposes for which it was so established by Parliament : but it is found necessary to improve its proceedings in some respects for the better despatch of business, and expedient also to extend its jurisdiction and powers : and whereas by the laws now in force in certain of Her Majesty's Colonies and Possessions abroad no Appeals can be brought to Her Majesty in Council for the reversal of the judgments, sentences, decrees, and orders of any Courts of Justice, within such Colonies, save only of the Courts of Error or Courts of Appeal within the same, and it is expedient that Her Majesty in Council should be authorised to provide for the admission of Appeals from other Courts of Justice within such Colonies or Possessions : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, that it ^{Her Majesty, by Order in Council, may provide for the Admission of an Appeal from any Colony, although} shall be competent to Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her Privy Council, to provide for the admission of any Appeal or Appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of

there shall not be a Court of Error or of Appeal in such Colony; and may revoke such Orders.

Justice within any British Colony or Possession abroad, although such Court shall not be a Court of Errors or a Court of Appeal within such colony or possession; and it shall also be competent to Her Majesty, by any such order or orders as aforesaid, to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such Appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon: Provided always, that it shall be competent to Her Majesty in Council to revoke, alter and amend any such order or orders as aforesaid, as to Her Majesty in Council shall seem meet: Provided also, that any such order as aforesaid may be either general and extending to all Appeals to be brought from any such Court of Justice as aforesaid, or special and extending only to any Appeal to be brought in any particular case: Provided also, that every such general Order in Council as aforesaid shall be published in the *London Gazette* within one calendar month next after the making thereof: Provided also, that nothing herein contained shall be construed to extend, to take away, or diminish any power now by law vested in Her Majesty for regulating Appeals to Her Majesty in Council from the judgments, sentences, decrees, or orders of any Courts of Justice within any of Her Majesty's Colonies or Possessions abroad.

Orders may be either general or special.

General Orders to be published.

Nothing herein to affect the present powers for regulating Appeals from the Colonies.

On Petition Her Majesty may grant an extension of patent term in certain cases.

II. And whereas it is expedient for the further encouragement of inventions in the useful arts, to enable the time of monopoly in patents to be extended in cases in which it can be satisfactorily shown that the expense of the invention hath been greater than the time now limited by law will suffice to reimburse; be it enacted, that if any person, having obtained a patent for any invention, shall before the expiration thereof present a Petition to Her Majesty in Council, setting forth that he has been unable to obtain a due remuneration for his expense and labour in perfecting such invention, and that an exclusive right of using and vending the same for the further period of seven years, in addition to the term in such patent mentioned, will not suffice for his reimbursement and remuneration, then, if the matter of

such petition shall be by Her Majesty referred to the Judicial Committee of the Privy Council, the said Committee shall proceed to consider the same after the manner and in the usual course of its proceedings touching patents, and if the said Committee shall be of opinion, and shall so report to Her Majesty, that a further period greater than seven years extension of the said patent term ought to be granted to the petitioner, it shall be lawful for Her Majesty, if she shall so think fit, to grant an extension thereof for any time not exceeding fourteen years, in like manner and subject to the same rules as the extension for a term not exceeding seven years is now granted under the powers of the said Act of the sixth year of the reign of his late Majesty.

III. Provided always and be it enacted, that nothing herein contained shall prevent the said Judicial Committee from reporting that an extension for any period not exceeding seven years should be granted, or prevent her Majesty from granting an extension for such lesser term than the petition shall have prayed. Her Majesty may grant extension for a lesser term than that prayed.

IV. And whereas doubts have arisen touching the power given by the said recited Act of the sixth year of the reign of his late Majesty in cases where the patentees, have wholly or in part assigned their right; be it enacted, that it shall be lawful for Her Majesty, on the report of the Judicial Committee, to grant such extension as is authorized by the said Act and by this Act, either to an assignee or assignees, or to the original patentee or patentees, or to an assignee or assignees and original patentee or patentees conjointly. As to extension of term where patentees have assigned their patent rights.

V. And be it enacted, that in case the original patentee or patentees hath or have departed with his or their whole or any part of his or their interest by assignment to any other person or persons, it shall be lawful for such patentee, together with such assignee or assignees if part only hath been assigned, and for the assignee or assignees if the whole hath been assigned, to enter a disclaimer and memorandum of alteration under the powers of the said recited Act; and such disclaimer and memorandum of such alteration, having been so entered and filed as in the said recited Act mentioned, Disclaimer and memorandum of alteration under 5 & 6 W. 4. c. 83; may be made, notwithstanding original patentee may have assigned his patent right.

shall be valid and effectual in favour of any person or persons in whom the rights under the said letters patent may then be or thereafter become legally vested ; and no objection shall be made in any proceeding whatsoever on the ground that the party making such disclaimer or memorandum of such alteration had not sufficient authority in that behalf.

Disclaimer and memorandum of alteration already made, to be deemed valid

VI. And be it enacted, that any disclaimer or memorandum of alteration before the passing of this Act, or by virtue of the said recited Act, by such patentee with such assignee or by such assignee as aforesaid, shall be valid and effectual to bind any person or persons in whom the said letters patent might then be or have since become vested ; and no objection shall be made in any proceeding whatsoever that the party making such disclaimer or memorandum of alteration had not authority in that behalf.

New letters patent granted, under 5 & 6 W. 4., to assignees before passing of this Act, declared valid.

Proviso.

VII. And be it enacted, that any new letters patent which before the passing of this Act may have been granted, under the provisions of the above-recited Act of the sixth year of the reign of his late Majesty, to an assignee or assignees, shall be as valid and effectual as if the said letters patent had been made after the passing of this Act, and the title of any party to such new letters patent shall not be invalidated by reason of the same having been granted to an assignee or assignees : Provided always, that nothing herein contained shall give any validity or effect to any letters patent heretofore granted to any assignee or assignees where any action or proceeding in *scire facias* or suit in equity shall have been commenced at any time before the passing of this Act, wherein the validity of such letters patent shall have been or may be questioned.

Judicial Committee may appoint Clerk of Privy Council to take proofs in matters referred to them.

VIII. Provided always, and be it enacted, that in the case of any matter or thing being referred to the Judicial Committee, it shall be lawful for the said Committee to appoint one or other of the clerks of the Privy Council to take any formal proofs required to be taken in dealing with the matter or thing so referred, and shall, if they so think fit, proceed upon such clerk's report to them as if such formal proofs had been taken by and before the said Judicial Committee.

IX. And be it enacted, that in case any Petition of Appeal whatever shall be presented, addressed to Her Majesty in Council, and such Petition shall be duly lodged with the clerk of the Privy Council, it shall be lawful for the said Judicial Committee to proceed in hearing and reporting upon such Appeal, without any special Order in Council referring the same to them, provided that Her Majesty in Council shall have, by an Order in Council in the month of *November*, directed that all Appeals shall be referred to the said Judicial Committee on which petitions may be presented to Her Majesty in Council during the twelve months next after the making of such order; and that the said Judicial Committee shall proceed to hear and report upon all such Appeals in like manner as if each such Appeal had been referred to the said Judicial Committee by a special order of Her Majesty in Council: Provided always, that it shall be lawful for Her Majesty in Council at any time to rescind any general order so made; and in case of such order being so rescinded, all Petitions of Appeal shall, in the first instance, be preferred to Her Majesty in Council, and shall not be proceeded with by the said Judicial Committee without a special order of reference.

Judicial Committee may proceed to hearing of Appeals without special order of reference.

Proviso.

X. And be it enacted, that it shall be lawful for the said Judicial Committee to make an order or orders on any Court in any colony or foreign settlement, or foreign dominion of the Crown, requiring the Judge or Judges of such Court to transmit to the clerk of the Privy Council a copy of the notes of evidence in any cause tried before such Court, and of the reasons given by the Judge or Judges for the judgment pronounced in any case brought by appeal or by writ of error before the said Judicial Committee.

Judicial Committee may require notes of evidence taken in the Courts of any Colony, &c., of the Crown.

XI. And be it enacted, that it shall and may be lawful for the said Judicial Committee to make any general rule or regulation, to be binding upon all Courts in the Colonies and other Foreign Settlements of the Crown, requiring the Judges' notes of the evidence taken before such Court on any cause appealed, and of the reasons given by the Judges of such Court, or by any of them, for or against the judgment pronounced by such Court; which notes of evidence and reasons

Judicial Committee may make rules to be binding upon such Courts requiring Judges' notes of evidence, &c.

shall by such Court be transmitted to the clerk of the Privy Council within one calendar month next after the leave given by such Court to prosecute any Appeal to Her Majesty in Council ; and such order of the said Committee shall be binding upon all Judges of such Courts in the Colonies or Foreign Settlements of the Crown.

In cases of neglect to comply with Order of Council, persons so neglecting may be punished as for contempt.

XII. And be it enacted, that in all causes of Appeal to Her Majesty in Council from Ecclesiastical Courts, and from Admiralty or Vice-Admiralty Courts, which now are or may hereafter be depending, in which any person duly monished, or cited, or requested to comply with any lawful order or decree of Her Majesty in Council, or of the Judicial Committee of the Privy Council or their surrogates, made before or after the passing of this Act, shall neglect or refuse to pay obedience to such lawful order or decree, or shall commit any contempt of the process under the Seal of Her Majesty in ecclesiastical and maritime causes, it shall be lawful for the said Judicial Committee or their surrogates to pronounce such person to be contumacious and in contempt, and, after he or she shall have been so pronounced contumacious and in contempt, to cause process of sequestration to issue under the said Seal of Her Majesty against the real and personal estate, goods, chattels, and effects, wheresoever lying within the dominions of Her Majesty, of the person against or upon whom such order or decree shall have been made, in order to enforce obedience to the same and payment of the expenses attending such sequestration, and all proceedings consequent thereon, and to make such further order in respect of or consequent on such sequestration, and in respect to such real and personal estates, goods, chattels, and effects sequestrated thereby, as may be necessary, or for payment of monies arising from the same to the person to whom the same may be due, or into the registry of the High Court of Admiralty and Appeals, for the benefit of those who may be ultimately entitled thereto.

Act may be repealed, &c this session.

XIII. And be it enacted, that this Act may be repealed or amended during this session of Parliament.

Act 8th & 9th Vict., chap. 30.

An Act to amend an Act passed in the Third and Fourth Years of the Reign of His late Majesty King William the Fourth, intituled An Act for the better Administration of Justice in His Majesty's Privy Council.—[30th June 1845.]

Whereas by an Act passed in the Session held in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled *An Act for the better administration of Justice in His Majesty's Privy Council*, after reciting that various Appeals to His Majesty in Council from the Courts of *Sudder Dewanny Adawlut* at the several Presidencies of *Calcutta, Madras, and Bombay*, in the *East Indies*, had been admitted by the said Courts, and the transcripts of the proceedings in Appeal had been from time to time transmitted under the Seal of the said Courts through the East India Company, then called the United Company of Merchants of *England*, trading to the *East Indies*, to the office of His Majesty's said Privy Council, but that the suitors in the causes so appealed had not taken the necessary measures to bring on the same to a hearing, it was enacted that it should be lawful for His Majesty in Council to give such directions to the said company and other persons, for the purpose of bringing to a hearing before the Judicial Committee of the Privy Council the several cases appealed or thereafter to be appealed to His Majesty in Council from the several Courts of *Sudder Dewanny Adawlut* in the *East Indies*, and for appointing agents and counsel for the different parties in such Appeals, and to make such orders for the security and payment of the costs thereof as His said Majesty in Council should think fit, and thereupon such Appeals should be heard and reported on to His Majesty in Council, and should be by His Majesty in Council determined, in the same manner, and the judgments, orders, and decrees of His Majesty in Council thereon, should be of the same force and effect if the same had been brought to a hearing by the parties appealing, in the usual course of proceeding :

Recited provisions of 3 & 4 W. 4. c. 41, not to apply to Appeals admitted by *Sudder Courts* after 1st Jan. 1846.

Appeals admitted after 1st Jan. 1846, to be considered as abandoned by consent, unless, &c.

Provided always, that such last-mentioned powers should not extend to any Appeals from the said Courts of *Sudder Dewanny Adawlut* other than Appeals in which no proceedings then had been or should thereafter be taken in *England* on either side for a period of two years subsequent to the admission of the Appeal by such Court of *Sudder Dewanny Adawlut* : And whereas by certain Orders in Council made under certain powers contained in the said Act provision is made for registering in the Council Office the arrival in this country of the transcripts of the proceedings in Appeals from the said Courts : And whereas it is considered advisable that the said Act should be amended in manner hereinafter mentioned : Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the hereinbefore recited provisions of the said Act shall not apply to the case of any Appeal which shall be admitted by any of the said Courts of *Sudder Dewanny Adawlut* after the first day of *January* one thousand eight hundred and forty-six.

II. And be it enacted, That any Appeal to be admitted by any of the said Courts of *Sudder Dewanny Adawlut* after the said first day of *January* one thousand eight hundred and forty-six, shall be considered and be held to be abandoned and withdrawn by consent of the parties thereto, unless some proceedings shall be taken in *England* in the same by one or more of the parties thereto within two years after registration at the Council Office of the arrival of the transcript ; and any such Appeal as aforesaid shall be held to be abandoned and withdrawn in like manner under any other circumstances which Her Majesty in Council may from time to time by any orders or rules in that behalf direct to be taken and considered as a withdrawal thereof ; and the East India Company are hereby required from time to time to ascertain and certify to the proper Courts in the *East Indies*, all Appeals which may from time to time become abandoned and dropped under the provisions of this clause,

REPORTS OF CASES

HEARD AND DETERMINED

BY THE

JUDICIAL COMMITTEE

AND THE

LORDS OF THE PRIVY COUNCIL,

ON APPEAL FROM THE SUPREME AND SUDDER
DEWANNY COURTS IN THE EAST INDIES.

SHEIKH IMDAD ALI and others - - Appellants,

AND

MUSSUMAT KOOTBY BEGUM - - - Respondent.*

*On Appeal from the Sudder Dewanny Adawlut of
Bengal.*

*Limitation—Suit for possession—Claim barred by limitation—Exclusion
of time—Sufficient cause—Residence in distant place, if—Notice—
What amounts—Fraud—Proof of.*

The fact of residence at a distance of 900 miles from the place where the subject matter in dispute was situate : held insufficient to bring a party within the exception of the *Bengal Regulations of Limitation*, (III. of 1793, s. 14, and II. of 1805, s. 3;) the party in possession of the property being a purchaser for a valuable consideration without notice, and

THIS suit was instituted by the Respondent, *Mus-* 4 Dec. 1841,
sumat Kootby Begum, claiming as her inheritance an &
25 June 1842.

* Present : Members of the *Judicial Committee*,—Lord Brough
Lord Campbell, Mr. Justice Erskine, and the Right Hon
Lushington.

Privy Councillors,—Assessors,—Sir Edward
and Sir Alexander Johnston, Knt.

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interest in certain *mouzas* and other real estate situate in *zillah Patna*, alleged to have been the estate of her deceased mother, *Mussumat Saleha Khanum*, and for damages on account of the annual produce thereof.

The Complaint was filed on the 2nd of *April* 1825 in the Provincial Court of *Patna*, against the Defendants, who were in possession of the estates, and claimed to be entitled thereto as purchasers for valuable consideration without notice ; and set forth—That *Mussumat Saleha Khanum* died on the 3rd *Bysak*, 1207 *Fusly* (12th *April* 1800), leaving the Plaintiff, her only daughter, two grandsons, *Amin Oolla Khan* and *Kulb Ali Khan*, and one granddaughter, *Gusety Begum*, as heirs. That thereupon the whole of her estate, in conformity to *furraiz* (law of inheritance), became divisible into one hundred and sixty shares, eighty shares the right of the Plaintiff, sixty-four shares, in equal portions, the right of *Amin Oolla Khan* and *Kulb Ali Khan*, and sixteen shares the right of *Mussumat Gusety Begum* ; that the Plaintiff resided in *kusba Paniput*, in the province of *Delhi*, subordinate to *Shahjehanabad*, and that *Amin Oolla Khan* and *Kulb Ali Khan*, without her knowledge, and in her absence, had gifted, sold, or otherwise alienated to various persons, through whom the Defendants claimed, the whole of the *mouzas* in question, including the share of the Plaintiff, and the share belonging to *Gusety Begum*. It then stated a suit instituted by *Gusety Begum*, claiming a certain share of the property in question, and assigned rea-

the Plaintiff's right of action having accrued twenty-five years before the institution of the suit.

Evidence tendered to the *Sudder Court* on a Petition for review, which was refused and the order of refusal not appealed from, though forming part of the transcript, cannot be referred to in the argument upon the Appeal from the original Judgment.

sons for not making her a Defendant to the Plaint, and alleged that in consequence of the Plaintiff's distant residence, (being upwards of nine hundred miles from *Patna*,) she had no information of these matters.

The Defendants severally put in their answers, denying the Plaintiff's title, but insisting as to some, on their right as purchasers for valuable consideration without notice, and as to others, on an undisturbed possession for fourteen years.

On the 10th of *April* 1827, the Plaintiff filed a supplemental Plaint for the purpose of making other parties Defendants, who were alleged to be in possession of some of the property in question, stating, that in consequence of her distant residence she was not sufficiently informed of the persons who were respectively in the seizin and possession of the estate in dispute, but had learnt the fact from the answers of the Defendants.

On the 14th *April* 1827, the Plaintiff replied, insisting on her title to the property in question, and alleging that as *Amin Oolla Khan* and *Kulb Ali Khan*, from whom the Defendants claimed, came into possession by violence, she was entitled to, and claimed, the benefit of section iii. of Reg. II. of 1805, which in such case extends the period of limitation to sixty years, and as it appeared that the first sale or transfer made by *Amin Oolla Khan* and *Kulb Ali Khan* was on the 20th *Bhadoon*, 1221 *Fusly* (21st *August* or *September* 1814), and the others subsequent to that date, which was less than twelve years prior to the institution of the suit, the claim of the Plaintiff was not precluded by section ii., Reg. II. of 1805, which had been relied upon by the Defendants; she claimed also the benefit of the 14th section of Reg. III.

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of 1793, on the ground that she was and had been resident in a distant country. She also insisted that having been resident in a distant country, and not being aware of the sale, her claim was not barred by the lapse of time, or possession for above twelve years.

On the 13th of *June* 1827, the fourth Judge of the Provincial Court of *Patna* (Mr. *Steer*) decreed that the Plaintiff's claim was barred by clause 3, sect. iii., Reg. II. of 1805, and dismissed the suit with costs.

From this Decree, the present Respondent appealed to the *Sudder Dewanny Adawlut* of *Bengal*.

On the 18th of *May* 1831, the cause came on for hearing before *C. T. Sealy*, Esq., one of the Judges of the *Sudder Dewanny Adawlut*, who recorded his opinion as follows :—

“ In my opinion, in this case two things require consideration :—

“ 1st. Whether the villages in dispute were the estate of *Saleha Khanum*, or not? and—

“ 2nd. Whether the Plaintiff's suit was instituted within the limited period of hearing, or not?

“ By the decision of the Provincial Court, confirmed by this Court, regarding the case of *Gusety Begum* against *Kulb Ali Khan*, and others, and the law opinion of the *Moofiti* of the Provincial Court filed in that case, the villages in dispute were proved to be the estate of *Saleha Khanum*, and the objections and declarations of *Mussumat Beejy Begum* and other Defendants on that subject are inadmissible ; and the documents filed by them, unsupported as they were by any substantial testimony, are not deemed worthy of credit. And as in section iii., Reg. II. of 1805, it is unequivocally prescribed that the claim of a Plaintiff for possession of immoveable property

that may have been in the possession of an usurper for twelve years, and in the possession of the present possessor (whether by right of purchase or by any other good means) for less than twelve years, is entitled to a hearing and trial,—under this circumstance, and with reference to *khedarut* (concealment of women for the sake of modesty), and distant residence of Plaintiff, her claim, as touching *mouza Rupuspoor-oorf Salarpoor*, and *Hissa Chuk, Zahed Tilhar*, and *Churwan*, from the date of sale whereof, to the date of the institution of his suit, a period of twelve years having apparently not elapsed, is worthy of being decreed to her; and as touching *Mohi-ood-deen-poor*, and land measuring 3,000 *beegas* from *mouza Churwan*, from the date of sale whereof, up to the date of the institution of the suit, twelve years having elapsed, it is worthy of being dismissed: consequently it is ordered, that the decision of the Provincial Court, dated 13th of *June* 1827 C. E., be modified, that the claim of the Appellant touching *mouza Rupuspoor-oorf Salarpoor* and *Hissa Chuk, Zahed Tilhar*, and *mouza Churwan*, with the exception of *mouza Mohi-ood-deen-poor*, in the possession of *Byjnath Sahoo*, and with the exception of land measuring 3,000 *beegas* in *mouza Churwan*, in the possession of *Narain Das*, be decreed to her, and costs of both the Courts, account the claim proved be defrayed by Respondents; and account the claim not proved, by Appellant, respectively; and that the papers be referred for a second voice.”

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On the 31st of *May* 1831, the *Sudder Dewanny Adawlut* made its final Decree, by which, after concurring in the opinion of *C. T. Sealy, Esq.*, it was finally ordered and decreed, that the decision of the *Patna Provincial Court*, dated 13th *June* 1827, dis-

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missing the suit of the Plaintiff, be amended in accordance with the opinion of Mr. *Sealy*, as above stated ; the costs of the claim proved, to be defrayed by Respondents; and the costs of the claim not proved, by Appellants, respectively.

Sheikh Imdad Ali and other Respondents (the present Appellants) afterwards presented a Petition to the Court, praying for a review of Judgment, on the ground that the lapse of twelve years applied to the village of *Rupuspoor-oorf Salarpoor*, it having been in the possession of *Boorham Ali Khan* (the first purchaser) and the Petitioners for more than twelve years, and they tendered two deeds of sale made by *Amin Oolla Khan* to *Boorham Ali*, dated 16th *Rajab*, 1227 *Hijra* (26th July 1812), for half of *Rupuspoor*, and the other deed of sale dated 21st *Rabi-no-sani*, 1230 *Hijra* (2nd April 1815), for two-fifths of *Rupuspoor*, in support of their allegation.

The *Sudder Dewanny Adawlut*, on the 21st of November 1831, refused the prayer of this Petition.

From the above Decree of the 31st of May, the Appellants appealed to his late Majesty in Council ; the Appellants, however, did not appeal from the order refusing a rehearing.

Pending the appeal, and before it came on for hearing, one of the Appellants entered into an agreement with the Respondent to compromise and withdraw his appeal, and presented a Petition to Her Majesty in Council, praying that his name might be erased or withdrawn from the proceedings on appeal in *England*, and that the agreement of compromise might be carried into effect under the order and direction of the *Sudder* Court.

The Petition to withdraw came on for hearing with the appeal, and was allowed in the terms of the prayer.

On the opening of the case, an objection was taken by the Respondent's Counsel, to the Appellants referring to or reading as evidence in the appeal the documents tendered to the *Sudder* Court on the application for a review of Judgment, inasmuch as the order refusing such application had not been appealed from.

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Their Lordships were of opinion, that as the appeal was from the Decree of the 31st of *May* 1831 only, the objection was valid, and that the subsequent order not being appealed from, the documents produced to the Court ought not to have formed part of the transcript.

Mr. *Miller*, Q. C., Mr. *L. Wigram*, Q. C., and Mr. *Jackson*, for the Appellants.

The Appellants are purchasers of the property in dispute for a valuable consideration, without notice of the Respondent's claim, who suffered it to be dealt with without preferring any claim, and, moreover, has assigned no sufficient reason for the delay in prosecuting her claim for a period of twenty-five years after her title accrued. The mere fact of residence in a distant country will not prevent the operation of the Regulations of Limitation. *Bhaee-chund* and *Koosal-chund* v. *Purtab-chund Manik-chund* (a).

The claim of the Respondent to that part of the *Altamgah mahals* in the possession of the Appellants, which was purchased by their ancestor from *Beejy Begum*, is moreover barred by sect. xiv., Reg. III. of 1793, and clauses 1st and 3rd of sect. iii., Reg. II. of 1805, inasmuch as the same has been held under a fair title, within the meaning of the Regulations, since the 9th of *July* 1801; upwards of twenty-three years before the institution of the suit. The claim

(a) 1 Moore's Indian Appeal Cases, 154.

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also of the Respondent to that part of the *Altamgah mahals* in possession of the Appellants, which was purchased by them from *Sheikh Boorham Ali*, is barred by the same Regulations, inasmuch as the same was held under a fair title, within the meaning of the Regulations, twelve years before the institution of the suit. *Lal Rooderpurtab Sing v. Lal Dhokul Sing* (a). *Radachurn Mohapatur v. Gunganaraen Mohapatur* (b). *Mussumaut Zureenah Beebee v. Khajah Ali* (c). *Moo-hummud Yar Khan v. Moohummud Eesau Khan* (d).

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

It is proved by the evidence in the cause, that the *Altamgah mahal* in question was the estate of *Saleha Khanum*, the mother of the Respondent, and that she was in the seizin and possession thereof at the time of her death; and by the *Mahomedan* law of inheritance was entitled to eighty shares of one hundred and sixty shares (as claimed by her *Plaint*) of the estate of her deceased mother. The title cannot be disputed.

The ordinary period of twelve years for the institution of suits, as provided by Reg. III. of 1793, sect. xiv., and Reg. IV. of 1805, is not applicable to the circumstances of the present case; but with reference to those circumstances, so far as relates to the portions of the estate which are specified in the decree of the *Sudder Dewanny Adawlut*, the *Plaint* was filed within the period allowed by the Regulations. *Tubeeb Shah v. Budder Oodeen* (e).

6th July

Mr. Justice ERSKINE :

The original proceedings in this case were instituted

(a) 1 Mac. Sud. R. 253.

(b) 1 Mac. Sud. R. 297.

(c) 3 Mac. Sud. R. 32.

(d) 3 Mac. Sud. R. 292.

(e) 3 Mac. Sud. R. 162.

by the present Respondent, *Mussumat Kootby Begum*, in the Provincial Court at *Patna*, to recover sixty-four shares out of one hundred and sixty shares of an *Altamgha mahal* in the *zillah* of *Patna*, comprising several villages, which she claimed as her inheritance, derived from her mother, *Mussumat Saleha Khanum*, the widow of *Nawab Eneyet Khan*.

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In the Court below, two questions were raised and decided. First, whether the *mahal* in question was originally the estate of the *Nawab* or of his widow, *Saleha Khanum*; and, secondly, whether the claim of the Plaintiff, *Kootby Begum*, had been barred by the lapse of time according to the *Bengal Regulations*.

The Provincial Court, without giving any opinion on the first point, dismissed the Plaintiff's suit with costs, upon the ground that whatever her right might have been, her remedy by suit was barred by lapse of time, and that her claim was not entitled to a hearing by the Court. Against this Decree the Plaintiff appealed to the *Sudder Dewanny Adawlut*, and that Court, after hearing the appeal on the 31st of *December* 1831, decided, first, that the villages in dispute had been proved to have been the property of *Saleha Khanum*, and that the Plaintiff, as her daughter, was entitled to one-half as her inheritance; and, secondly, that although as to some of the villages the claim of the Plaintiff had been barred by lapse of time, that as to the rest, her remedy had not been taken away by the *Regulations* relied on.

The Court, therefore, modified the decision of the Provincial Court, by affirming its decree as to a part of the estate, and decreeing to the Plaintiff the remainder, and apportioning the costs between the parties.

The present Appellants, who had defended the suit

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below as purchasers, were dissatisfied with the decision of the *Sudder Dewanny Adawlut*, and appealed to the Queen in Council against that part of the Decree that affirmed the Plaintiff's right to recover a portion of the property claimed by her. And Her Majesty having been pleased to refer such appeal to the Judicial Committee, the case was argued before Lord *Brougham*, Lord *Campbell*, the Judge of the Admiralty, and myself, when on the part of the Appellants it was insisted, that whatever might have been the original title of the Plaintiff below, that her right to recover any part of the property had been altogether barred by the lapse of time, and that the Decree of the Provincial Court ought to have been wholly affirmed. Their Lordships acquiesce in this conclusion, and are of opinion that the decision of the Provincial Court was right, and that the Decree of the *Sudder Dewanny Adawlut* modifying it is wrong.

In order to explain the ground upon which their Lordships have founded their opinion, it will be necessary to refer more particularly to the facts established by the evidence, and to the language of the Regulations upon which the question arises.

It appeared by the evidence that *Saleha Khanum* was the wife of the *Nawab Eneyet Khan Rasikh*, and that they had three children, two sons and one daughter. It is clearly proved by the admissions of those under whom the Appellants claim as purchasers, as well as by other evidence, that the *mahal* in question was the property of *Saleha Khanum*, and that she having survived her husband, held possession of it until her death in 1801. The two sons died in their mother's lifetime. The daughter, the present Respondent, and the Plaintiff below, was living with her

mother at *Paniput* at the time of the mother's death. The eldest son, *Izzud Oollah Khan*, had died without issue. *Hafiz Oollah Khan*, the second son, had died only a few months before his mother, and had, down to the time of his death, managed the estate for his mother. He left three children, two sons and one daughter. Under these circumstances, by the *Ma-homedan* law of inheritance, the Plaintiff below became entitled to one-half of her mother's property, and the other half would descend to the children of her brother *Hafiz*

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These children were *Kulb Ali Khan*, *Amin Oollah Khan* and *Mussumat Gusety Begum*. Upon the death, however, of *Saleha Khanum* in 1801, *Kulb Ali Khan* and *Amin Oollah Khan* took possession of the whole of the estate, and dealt with it as if it were entirely their own; and until the year 1812 neither their aunt nor their sister preferred any claim to any part of the inheritance.

On the 4th of *March* in the year 1812, *Mussumat Gusety Begum*, the sister, instituted proceedings in the *Patna* Provincial Court against her two brothers, to recover a fifth share of the *mahal*; and by the Decree of that Court, which was afterwards, in the year 1818, confirmed upon appeal by the *Sudder Dewanny Adawlut*, she recovered one-fifth of the whole estate as her share of the inheritance from *Saleha Khanum*. It is to be observed, that the claim of the sister and the resistance on the part of the brothers proceeded on the assumption that the whole inheritance had descended from *Saleha Khanum* to the children of *Hafiz Oollah Khan*, and that no allusion was made in the course of the suit to any claim of their aunt, the present Respondent, although her name is stated to have been

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registered in the Collector's Office. It appeared that long prior to the commencement of this suit, namely, in the year 1801, *Kulb Ali Khan* had settled one-half of the property which he claimed as his share upon his wife, *Beejy Begum* ; and *Amin Oollah Khan* had in 1805 transferred his share to his son, *Azim Oollah Khan* ; but neither of these transfers appear to have been acted upon further than by having the names recorded in the Collector's Office, and the two brothers had continued to deal with the property as their own ; for in the year 1807, *Kulb Ali Khan*, acting for himself and his brother, sold a part of the estate to *Baboo Bysnath Sahoo*, and although in the years 1813, 1814, *Beejy Begum* assumed the power of selling portions of the estate, there is no evidence that *Azim Oollah Khan* ever acted as owner of any part of the estate under the alleged transfer to him ; but, on the contrary, *Amin Oolla Khan*, his father, continued to dispose of the estate as if no such transfer had been made, and the Appellants at the trial below rested their claim entirely upon purchases made from *Beejy Begum* and *Amin Oollah Khan*.

The dates of those sales, as proved in the progress of the suit, were in the years 1813, 1814, within twelve years from the commencement of the Respondent's suit, and these dates formed the foundation of the Decree of the *Sudder Adawlut*, which decided, that the Plaintiff's remedy had been barred as to *Mohi-ood-deen*, sold by *Kulb Ali Khan* in 1807—more than twelve years before the commencement of the suit, but was not barred as to the residue, which did not appear by the evidence to have been sold before the years 1813 and 1814.

After the Decree had been pronounced, the Appel-

lants petitioned to have the cause heard again, and to be allowed to put in evidence other Deeds, to prove, that as to another portion of the estate, the remedy of the Plaintiff had been barred by a sale beyond the twelve years, namely, in 1812, to *Boorham Ali Khan*, from whom the Appellants purchased that portion in 1824. The Court however refused, and we think properly, to re-open the case, for the purpose of admitting evidence which ought to have been produced in the first instance, and there is no Appeal from that refusal: the question therefore for decision is, whether, under the circumstances of the case, the remedy of the Plaintiff had been barred by the adverse possession of *Kulb Ali Khan* and *Amin Oolla Khan*, from the year 1800 to 1825.

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The answer to this question depends upon the construction of the *Bengal* Regulations, namely, Reg. III. of 1793, s. 14, and Reg. II. of 1805, s. 3. By Reg. III., s. 4, *Zillah* and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it—unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promised to pay the money; or that he had directly preferred his claim within that period, for the matters in dispute, to a Court of competent jurisdiction, to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit; or shall prove that either from minority or other good and sufficient cause he had been precluded from obtaining redress,

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Now in this case the Plaintiff's cause of action arose twenty-five years before the commencement of the suit, and no other suit was ever instituted by her on account of it. Her claim therefore is clearly barred, unless she can by proof bring herself within one of the exceptions. The only exception under this Regulation, from which any protection has been claimed, is the last, namely, that she has been precluded from obtaining redress by a good and sufficient cause; and the cause relied on, is the distance of her residence from the estates in dispute, and from the tribunal before which alone she could have preferred her claim. It appears by the evidence that the Plaintiff lived at *Paniput*, several hundred miles from *Patna*; but as the distance in 1800 could have afforded no greater impediment to the appointment of a *Mokhtar* to enforce her rights, than it did in 1825, the only way in which it can be said to have precluded her from obtaining redress, would be, by keeping her in ignorance of the manner in which her rights had been usurped by her nephews; but it must be remembered that her mother died at *Paniput*, and that her right to one half of the estate devolved upon her immediately upon her mother's death, and that her not receiving any remittances on account of the estate must have afforded sufficient notice to her, that some one must be usurping her rights, and this not for one or two years only, but for a series of more than twenty years, during which time she appears to have made no inquiry, nor to have instituted any proceedings to assert her claim, but permitted her nephews to hold themselves out to the world as the sole owners of the estate.

When, therefore, the question arises between the purchasers of an estate from persons who had been

thus permitted to hold themselves out to the world for more than twelve years before the purchase, and an owner, by whose neglect they had thus been enabled to assume the character of proprietors, the Court ought to have some other facts than mere distant residence, to make out the proof of some good and sufficient cause that had precluded an earlier assertion of a right that must have been well known to the claimant from the beginning. The Appellants had every reason to assume that the two nephews were the owners, not only from their long and undisputed possession, but also from the circumstance, that when a claim to some share was, in the year 1812, asserted by the sister, no suggestion of the Plaintiff's claim was interposed by her or on her behalf.

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Let us then see whether there is anything in the Regulations of 1805, that open to the Plaintiff the doors of the *Zillah* Court, which the Regulations of 1793 had closed.

By Reg. II. of 1805, s. 3, it is declared that the limitation of twelve years, fixed by the Regulation of 1793, "shall also not be considered applicable to any private claims of right to lands, houses, or other permanent immoveable property, if the person or persons in possession of such property, when the claim of right thereto may be preferred in a competent Court of Judicature, shall have acquired possession thereof by violence, fraud, or any other unjust, dishonest means whatever; or if such property shall have been so acquired by any other person or persons from whom the actual occupant or occupants may have derived his or their title, and shall not have been subsequently held under a just and honest title (such as inheritance, purchase, fair donation, or any other fair title, believed to

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have conveyed a right of possession and property), during a period of twelve years, antecedent to the time of preferring a claim of right thereto, in a competent Court : provided that such violent, fraudulent, unjust or dishonest acquisition, be established to the satisfaction of the Court in which the claim may be preferred ; or if the suit be appealable to the satisfaction of the proper Court of Appeal.” And by the 3rd clause of the same section, after prohibiting the Courts from taking judicial cognizance of any suit preferred after sixty years’ non-prosecution, the Regulation proceeds to declare, that ‘although the property claimed may have been acquired by an insufficient title within the period of sixty years, if the property so acquired shall have descended by inheritance to the person in possession, when the claim is preferred, or if such person shall have obtained just and honest possession thereof by purchase, fair donation, or by any other title believed to be just and valid, and not appearing to be in any respect collusive, for the purpose of depriving Plaintiff of his right, and either such occupant himself, or any other person in his behalf, or from whom the property may have been obtained under any of the titles aforesaid, or the whole in succession shall have held quiet and unmolested possession under a title believed to be just and valid during a period of twelve years antecedent to the claim thereto being preferred in a competent Court, the provisions made in the 1st and 2nd clause of that section shall not be considered applicable to any private claims to property so circumstanced, which are therefore to be deemed inadmissible as heretofore after twelve years from the origin of the cause of action, unless the same be cognizable under the exceptions and provisions already in force,’

Under this Regulation the Plaintiff contends that although her claim was not preferred to any competent Court till more than twelve years after her cause of action had arisen, yet that as her nephews had acquired possession of the property by unjust and dishonest means, and as the purchase by the Appellants, however fair and just, had been made within twelve years, neither they nor any person under whom they claimed, had, during a period of twelve years, antecedent to the time of preferring her claim, held under any fair title believed to have conveyed a right of possession and property, and therefore that the prohibition contained in the Reg. III. of 1793, s. 14, was not applicable to her case.

In considering the provisions above referred to, it must be kept in mind that one, the main object of these laws of limitation, is to protect an honest purchaser from the consequences of an owner's neglect to assert his rights, and thus giving to a usurper the semblance of a title which he did not really possess, and that by the express words of the Regulation, the proof of the fraudulent, unjust, or dishonest acquisition is thrown upon the Plaintiff. It is necessary therefore to ascertain what is meant by an unjust or dishonest acquisition : it is obvious from the 3rd clause of the section, that it is not intended to include every acquisition without a just title ; for by that clause, acquisitions are protected that have been obtained by any title believed to be just and valid, though in reality insufficient. It must be necessary, therefore, for a Plaintiff, in the first place, to show that the person under whom an occupant, by just title, acquired within the twelve years, derives his title, had acquired his possession by a title which he did not at the time believe to be just and valid.

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The Plaintiff in this case contends, that as her nephews must have known that one half of the inheritance belonged to her, and as they must have known that she was still alive, their assumption of the entire property was a dishonest acquisition, and could not have been claimed by them under any title which they believed at the time to be just and valid. It cannot be denied that there are many circumstances leading to a strong suspicion that this was the case, and the *Sudder Adawlut* appears so to have considered it.

But strong as the grounds of suspicion undoubtedly are, their Lordships do not consider the facts proved as sufficiently establishing, to their satisfaction, that the nephews knew that they had no right to the whole estate. They may have originally taken possession under the belief that their father *Hafiz* had acquired a title to the property of which he had been in possession up to his death. They may have been ignorant of the existence of their aunt, or of her title to any share of the property.

There is no evidence of their being aware of either: that they were so, could only be matter of conjecture; but fraud and dishonesty are not to be assumed upon conjecture, however probable.

But to avoid the effect of the lapse of time, the Plaintiff must establish the existence of conscious injustice by proof. Their Lordships think this has not been done, and, therefore, they will advise Her Majesty to reverse the Decree of the *Sudder Dewanny Adawlut* and affirm the Decree of the Provincial Court, condemning the Respondent in costs, in both the Courts below; but their Lordships are of opinion that each party should bear their own costs of the Appeal to Her Majesty in Council.

ON APPEALS FROM THE EAST INDIES.

THE BANK OF BENGAL - - - - Appellants,

AND

RADAKISSEN MITTER - - - - Respondent.*

*On Appeal from the Equity Side of the Supreme Court
of Bengal.*

*Bill of exchange—Liability of drawer—Acceptance by creditor of security
from debtor—If relieves surety—Creditor and debtor—Appropriation
of payments—Rights of creditor.*

A. drew five Bills in favour of B. on *Fergusson & Co.*, who accepted the same, and got them discounted by the Bank of *Bengal*, and on their becoming due procured their renewal. *Fergusson & Co.* subsequently drew three Bills on the Bank of *Bengal*; and, for securing, as well the repayment of the principal sum due on these Bills and interest, as of all and every sum or sums which the Bank had already advanced or should advance on account of the drawers, deposited as collateral securities various quantities of *Chili* copper of a larger amount in value than the advances then made. By a condition in these Bills, the Bank were authorized, in default of payment within the time stipulated, to dispose of the copper by public or private sale, and to reimburse themselves the principal and interest due thereon. Shortly afterwards, *Fergusson & Co.* failed, and Assignees of their estate and effects were appointed under the Indian Insolvent Act. On presentation to A. of the first of the renewed Bills, he served notice on the Bank not to part with the securities so deposited with them, alleging that the Bills drawn and renewed by him, were accommodation bills, for which he had not received any consideration, and were renewed on the faith of the securities being applicable to their discharge. The Assignees of *Fergusson & Co.* redeemed the copper by paying to the Bank the amount of the principal and interest due upon the Bills drawn by *Fergusson & Co.* All the Bills drawn by A. were dishonoured, and the Bank of *Bengal* brought an action against A. for their amount. On a Bill filed by A., the Bank were restrained by Injunction from proceeding with the action at law. Held on Appeal by the

THIS was an Appeal from a decree in a cause instituted by the Respondent against the Appellants and others, to restrain the Appellants from proceeding to enforce the payment of certain Bills of Exchange drawn by the Respondent on, and accepted by, the firm of *Fergusson & Co.*, and discounted on their behalf by the Appellants, the Bank of *Bengal*.

28th June,
1842.

* Present: Lord Brougham, Mr. Baron Parke, Vice-Chancellor Knight Bruce, and The Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

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Judicial Committee, discharging the Injunction and reversing the Decree of the Supreme Court, that, under the circumstances, the redemption of the securities was a sale within the meaning of the condition contained in the deposit Bills, and that such sale was not a release to A. as surety for the previous Bills, the condition not being that the copper or the proceeds thereof should be applied preferentially or *pari passu* with the other debts, but simply in reimbursement to the Bank, of the principal and interest due upon the Bills.

In 1832, the Appellants having agreed to discount Bills to the amount of S. R. 450,000 on account of *Fergusson & Co.*, five Bills were drawn by the Respondent, on behalf of that firm, upon one *Durponarain Gangooly*, a *sircar* or manager in their employ, by whom they were indorsed, and accepted by the Appellants.

The Bills were severally made payable three months after date, in accordance with the provisions of section 15 of the Charter of Incorporation of the Bank of *Bengal*, which prohibits the Bank from discounting any negotiable securities that have a longer period to run.

These Bills being, as it was alleged, merely accommodation Bills for the firm of *Fergusson & Co.*, and drawn by the Respondent, upon an understanding with them, that he should run no risk on their account, were, with one exception, never paid, but from time to time, and as they became due, were renewed by the Respondent, other Bills being substituted in their stead, the five last of which bore date respectively the 2nd, 6th, and 28th days of *September* 1833, and were collectively for the sum of S. R. 400,000; 50,000 having been paid on their account.

Besides the Bills thus drawn and renewed by the Respondent, the Bank of *Bengal* were in possession of three Bills of the same dates drawn by *Fergusson & Co.* in their own names, and accepted by the Appellants,

together with a quantity of copper, deposited as collateral security for the payment thereof.

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Each of these Bills was similar in form, varying only in the amount and value of the collateral security. The first, dated the 2nd *September* 1833, was as follows:

“Bank of *Bengal*, 2nd *September* 1833.

“Three months after date we promise to pay to
“*George Haley*, Treasurer of the Bank of *Bengal*, on
“account of the said Bank, the sum of *sicca rupees*
“(245,600) two hundred and forty-five thousand and
“six hundred, with interest at the rate of four (4)
“rupees (4) four per cent. per annum, and for se-
“curing the repayment as well of the said principal
“sum, and interest, at the rate aforesaid, as of all and
“every sum or sums which the said Bank of *Bengal*,
“or the Treasurer of the Bank for the time being, or
“any other person or persons on account of the said
“Bank, have already advanced or paid, or have en-
“gaged to advance or pay, or shall or may at any
“time or times hereafter advance or pay, or become
“engaged to advance or pay to, or on our account, or
“to or on account of us, or any or either of our
“executors or administrators, or representatives, or
“any or either of them together, with interest for the
“same sum or sums of money respectively at the rate
“of twelve per cent. per annum: we, the said *Fer-*
“*gusson & Co.*, have deposited in the said Bank, as
“collateral security, *Chili* copper, 10,000 *maunds**, at
“30 current rupees, valued of *sicca rupees* (327,500)
“three hundred and twenty-seven thousand and five

* A measure of weight amounting in *Bengal* to about 80 lbs.—
Hamilton's E. I. Gazetteer.

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“hundred : and in default of payment at the period
 “above mentioned, we, the said *Fergusson & Co.*,
 “hereby authorize the Treasurer of the said Bank for
 “the time being, absolutely to sell or dispose of the
 “said *Chili* copper for the reimbursement to the said
 “Bank, as well of the said principal and interest at
 “the rate aforesaid, as of all and every such other
 “sum or sums of money, together with interest as
 “aforesaid, on or before the expiration of the said
 “period, by public or private sale, the said Treasurer
 “rendering to us, the said *Fergusson & Co.*, any
 “surplus which may be forthcoming from such sale,
 “and we being bound to make good to him whatever
 “deficiency there may be below the amount of the
 “said principal sum and interest as aforesaid, and the
 “sale price of the said *Chili* copper to be made on
 “the price to be calculated at the premium or dis-
 “count of the *Chili* copper on the day on which the
 “said *Chili* copper shall be so sold; but if the said
 “Treasurer shall not proceed to sell or dispose of the
 “said *Chili* copper at such period, we, the said *Fer-*
 “*gusson & Co.*, shall and will pay and allow to the
 “said Bank of *Bengal*, interest at and after the rate of
 “twelve per cent. per annum on the said sum, and
 “on all and every such other sums as aforesaid, up to
 “the day on which the said sum shall be paid off and
 “liquidated, or up to the day on which the said
 “Treasurer of the said Bank of *Bengal* shall, in pur-
 “suance of the power hereinbefore contained, sell and
 “dispose of the said copper so deposited as aforesaid,
 “as the case may happen.

(Signed)

“FERGUSSON & Co.”

Witness, *Radananth Bose*.

The second Bill, which bore date the 6th of *September* 1833, was for the sum of S. R. 73,700, for which eleven slabs of copper weighing 3,000 *maunds* and upwards, of the value of S. R. 98,275, were deposited in like manner as collateral security: and the third Bill, dated the 28th of *September* 1833, was for the sum of S. R. 35,400, for which 560 slabs of copper weighing 1,500 *maunds* and upwards, of the value of S. R. 47,200, were deposited as collateral security.

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It was alleged and insisted by the Respondent, that he was induced to execute the renewed Bills of the 2nd, 6th, and 28th of *September* in consequence of the deposits of copper so made by *Fergusson & Co.* with the Bank of *Bengal*.

In the month of *October* 1833, *Fergusson & Co.* received from the Bank of *Bengal* a further loan of S. R. 490,000, the repayment whereof was secured by a Promissory Note, similar in form, for the amount, and a mortgage or pledge of 3,500 *maunds* of indigo, the property of the firm, which was then of the value of S. R. 800,000, or thereabouts.

On the 26th of *November* 1833, *Fergusson & Co.* presented their petition under the Act for the Relief of Insolvent Debtors in the *East Indies*, 9 Geo. IV., c. 73, and were adjudged and declared insolvent, and assignees appointed of their estate and effects.

The first of the renewed Bills drawn by the Respondent having become due, and having been dishonoured by the acceptors, the Bank of *Bengal* caused the same to be presented, on the 10th of *December* 1833, to the Respondent for payment, which

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was refused, and on the 27th of the same month the following notice was served by his attorney on his behalf upon the Secretary of the Bank:—

“We are instructed by *Radakissen Mitter*, the drawer of several Notes or Bills, accepted by *Messrs. Fergusson & Co.*, and payable to the Bank of *Bengal*, to give notice, that if you part with or pay over to the Assignees of the said late firm of *Messrs. Fergusson & Co.* any security or securities, and sum or sums of money which may be realized upon any such security or securities which the Bank of *Bengal* holds of the said late firm as deposits and pledges for loans made by the said Bank to the said late firm on the said several Notes or Bills, you and the Bank of *Bengal* will be held responsible for the same to our client, as our client derived no benefit from the said Notes and Bills, and became a party to them upon the express understanding that the whole of the said several securities, so deposited and pledged by the said late firm with the said Bank, were ample for the payment of the said Notes and Bills, and were in the first instance to go towards liquidation thereof.”

On the 10th of *February* 1834, *Durponarain Gangooly*, who was the indorser of each of the Bills drawn by the Respondent, obtained (at the instance, as it appeared, of the Assignees of *Fergusson & Co.*) from the Appellants a loan of S. R. 300,000, upon the pledge and deposit of negotiable Paper of the East India Company to the amount of S. R. 318,200. This loan was secured by the Promissory Note of *Gangooly*, in the same form as those previously drawn by *Fergusson & Co.*

Early in the same month, the Assignees applied to the Appellants to redeem the several parcels of copper held by them as collateral security for the Bills drawn by *Fergusson & Co.* in *September* 1833; and after a short delay, for the purpose, as was stated by the Appellants, of ascertaining whether such deposits were applicable for the general liabilities of the Insolvent firm, and also the amount for which the copper could be sold, they permitted such redemption, and delivered up the whole of the copper so deposited to the Assignees upon payment of the sum of S. R. 366,109, and a fraction, being the total amount of principal and interest then due to the Appellants upon the loans made upon such specific deposits.

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On the 22nd of *February* 1834, before the last mentioned Promissory Note of the 10th of *February* 1834 became due, the assignees of *Fergusson & Co.* applied to the Appellants to redeem the Company's Paper deposited by *Durponarain Gangooly*, alleging such Paper to have been part of the assets of *Fergusson & Co.*, and consequently vested in them, and that *Gangooly* acted in the matter merely as their agent, and was himself a person of no property or substance. The Appellants upon these representations permitted the redemption by the Assignees, and delivered over the Company's Paper on the receipt of S. R. 300,000, with interest; and in the following month the Appellants permitted the Assignees of *Fergusson & Co.* to redeem the *maunds* of indigo, upon payment by them of the sum due on the Promissory Note of *October* 1833.

At the time of the failure of the firm of *Fergusson & Co.*, there was one share in the Bank of Bengal held by that firm, but registered in the name of *William*

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Frederick Fergusson, as the proprietor thereof, and which was then of the value of S. R. 16,000, or thereabouts. After the failure of the firm, the Appellants, according to the provision of the Act for incorporating the Bank, No. VI. of 1839, s. 39, and the proviso in the 21st section of the Charter, appropriated and transferred the dividends on the same share, amounting altogether to S. R. 600, towards and in part payment of the first of the five discounted Bills drawn by the Respondent, in the hands of the Appellants at the time of such failure, and in further reduction of the liability of the Respondent thereon. On the 12th of *August* 1833, the Appellants commenced an action of *assumpsit* on the plea side of the Supreme Court against the Respondent, for the purpose of recovering the balance due on the five Bills drawn by him and discounted by the Bank as above stated.

In consequence of these proceedings, the Respondent, on the 8th of *November* 1834, filed a Bill in the Equity side of the Court against the Appellants, their Secretary, and the Assignees of *Fergusson & Co.* The Bill set forth the circumstances above stated, and insisted that the terms on which the Respondent consented to become the drawer of the Bills in question were well known to the Appellants; the Complainant also insisted that the Appellants were bound to proceed in the first instance against the Assignees of the Insolvent Estate; that the several collateral securities held by the Bank were liable as well for the debts due from the firm previous to their deposit, as for those incurred at the time; and that the Appellants, by permitting the redemption of the same after the notice served on them on behalf of the Respondent, and without his assent, had relieved him from all liability in respect of the

several Bills of Exchange, or at least to the extent of any surplus value thereof, beyond the amount for which the same were specifically pledged and deposited, and prayed that the Appellants and the Assignees, and all persons claiming under them, might be perpetually restrained from taking any further proceedings against the Respondent to enforce payment of the said five Bills whereon such action had been brought.

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The Appellants by their Answer admitted the fact of the transactions set forth in the Bill, and stated the several Bills drawn by the Respondent to have been successively indorsed to and discounted by the Appellants in the ordinary course of their business, and denied that the same had been drawn or recovered by the Respondent on any such assurance or representation of the firm of *Fergusson & Co.*, or of the Appellants, as alleged by him, or upon the faith and credit of the several deposits and pledges of copper and indigo, which they insisted were only liable for the sums for which they had been respectively deposited, and for which they had been redeemed by the Assignees : and they denied the several grounds of equitable relief claimed by the Respondent, and insisted on their right to proceed with their action at law for the recovery of the balance due on the several Promissory Notes.

The Assignees also put in their Answer, in which they admitted the facts as generally stated by the Bill, and also that subsequent to the redemption of the copper, they had sold the same at a profit, but tended that the rise in the value thereof was dental and unexpected, and that at the time of -----tion, the sum for which the same was redeemed was the full value. The Defendant, the Secretary of the

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the Respondent was not to be held liable for their amount, is unfounded in fact, and unsupported by evidence. The averment is expressly denied by the Appellants' answer, and no proof is tendered by the Respondent to support such allegation. It was said indeed in the Court below that the circumstance of *Fergusson* himself being a Director of the Bank, and a registered holder of Company's Paper, affected the Appellants with notice of the agreement between him and the Respondent; but if there were evidence of such an agreement, it could not affect the Appellant, since notice to one of the members of a corporation in his private character, and as a partner of a firm not members of the corporation, could not be held notice to the corporate body, who must necessarily all be strangers to the private affairs of their individual members. Were such the law, there would be no limit to the liabilities of a corporation.

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Again, it was argued in the Court below, that the Respondent was a surety, and on the ground of his having been released as such by the conduct of the Appellants, the Judgment on the re-hearing proceeded. But in what did his suretyship consist? He is the original drawer of the notes. Now at the time of their being drawn, no security was given by *Fergusson & Co.* to the Appellants, nor were any securities ever given by *Fergusson & Co.* for the amount of the Respondent's Bills. It is alleged by the pleadings, that the copper and indigo deposited by *Fergusson & Co.* with the Appellants, was for all sums due from the former, and that the Appellants had a general lien on the same, beyond the amount for which the deposits were respectively made. But the terms on which the deposits were made are explicit; they are redeemable for the

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Bank of *Bengal*, also put in his Answer to the Respondent's Bill.

The cause being at issue, witnesses were examined, and the same came on for hearing on the 13th of *July* 1838, before Sir *Edward Ryan*, Chief Justice of the Supreme Court, and Sir *Peter Grant*, who at the time were the only two Judges of the Court; when it was ordered (Mr. Justice *Grant* dissenting) that the Respondent's Bill should be dismissed with costs.

The Respondent being dissatisfied with this Decree, presented his Petition for, and obtained, a re-hearing of the cause on the 30th of *November* 1838, before the Judges by whom it was originally heard, and Sir *Henry William Seton*, who had been appointed one of the Judges of the Court since the former hearing.

On the 31st of *January* 1839, the Judges gave Judgment, when Mr. Justice *Seton* was of opinion that the injunction prayed for should be perpetual, in which Mr. Justice *Grant* concurred; but the Chief Justice adhered to his former opinion, that the Bill should be dismissed with costs. The decree, therefore, was, that the injunction to restrain proceedings at law should be made perpetual, each party paying his own costs, except the Defendant, the Secretary of the Bank, whose costs the Respondent was directed to pay.

From this Decree the Appellants appealed to Her Majesty in Council.

Mr. *Griffith Richards*, Q.C., and Mr. *Greenwood*, for the Appellants, The Bank of *Bengal*.

The allegation that the Bills drawn by the Respondent were mere accommodation Bills, and were drawn upon the understanding with *Fergusson & Co.* that

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several amounts specified: the Assignees had, therefore, a right to redeem the same on payment of each specific sum and interest. *The Bank of Bengal v. Young* (a). The debt contracted by the Bills was on the personal security of the Respondent, and the nature of the contract does not imply that he ever contemplated being held merely a surety. *Wright v. Simpson* (b). There was no dealing with the original Bills, or those renewed in their place, which could release the Respondent as the drawer: the only claim for such release is founded on the deposit Bills; there is no evidence of the agreement stated by the Respondent. The dishonour of the original Bills drawn by the Respondent, and the demand made on him for payment, was notice to him, that the Appellants held him liable; he was also cognizant of the deposit Bills, and the securities pledged therewith; this he stated himself. Now in order to entitle him to their benefit, he ought to have paid the debt and required the transfer of them to himself; the notice given on his behalf was not to part with the deposits, but they were pledged for specific sums, redeemable on their liquidation, and if the surety desired to have the benefit of them, he ought to have paid the principal due on them, and then taken an assignment; that is the only ground on which he could claim equitable relief: the payment of the debt, or the placing himself in the situation of the principal debtor; that is the principle of all the decisions. *Law v. East India Company* (c), *Boulton v. Stubbins* (d), *Mayhew v. Cricket* (e). In *Wade v. Coope* (f), the

(a) 2 Moore's Ind. App. Cases, 87.

(b) 6 Ves. 714-26.

(c) 4 Ves. 824.

(d) 18 Ves. 20.

(e) 2 Swan. 185.

(f) 2 Sim. 155, 160.

Vice-Chancellor, stating the law, says, "The doctrine is, that where a man becomes surety for a debtor for the payment of a debt, he has, if he pays the debt, a right to avail himself of all the securities which the creditor has. But that doctrine never applies to a person who becomes surety at one time, and a security is given to the same creditor, either for another debt, or, what is the same, for a distinct portion of the debt for which the first security was given:" and he continues, "I have not found any such case: on the contrary, all the notion I have of the law is, that the doctrine has always been stinted to the particular contingency of the debt being one, and the surety being given for the same debt, at the time when the person became surety for it." *Brown v. Carr* (a), *Spears v. Hartly* (b). Without payment of the debt, therefore, the Respondent had no right to the deposits, and the redemption by the Assignees for their market value was according to the terms upon which they were made, and in no way prejudicial to the Respondent.

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The Attorney-General (Sir *F. Pollock*), Mr. *Bethell*, Q.C., and Mr. *T. B. May*, for the Respondent.

That the Bills originally drawn by the Respondent were accommodation Bills, there can be no doubt. They were accepted by *Fergusson & Co.*, and the renewed Bills were in all respects similar to those drawn in the first instance. It is not pretended that the Respondent ever derived any benefit from them. This circumstance is sufficient evidence of the agreement that he should be held harmless. The Respondent was

(a) 2 Russ. 600.

(b) 3 Esp. 81.

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to all intents and purposes a surety. What then is the contract made with his principal, by the deposit Bills? The deposits are stated to be made for security as well of the principal sums and interest thereby secured, "as of all and every sum or sums which the said Bank of *Bengal*, or any other person or persons, on account of the said Bank, have already advanced or paid, or have engaged to advance or pay, or shall at any time hereafter advance or pay to or on our account, or of our executors, &c." That this contract was made with the privity of the Respondent, the notice served by him on the Bank of *Bengal* shows; but notwithstanding such notice and the term of the contract, the Appellants permit the Assignees to obtain possession of the deposits on payment of the principal and interest due upon *Fergusson* & Co.'s Bills, thereby giving up securities pledged for all sums which the Bank had already advanced. It is said that the surety is only intitled to the benefit of securities deposited by the principal upon payment to the creditor; but the authorities cited do not bear out that position. The true principle is, that the creditor is a trustee for the surety, not merely from the fact of payment, but from the relation that subsists between them; and consequently, whether the surety has paid or not, the creditor can do no act to his prejudice. This is the doctrine established in *Mayhew v. Cricket* (a), and the authorities there cited. In that case the surety sought his discharge through the medium of the same equity as is contended for here; and it appears from what fell from Lord *Eldon*, that, but for a subsequent promise, he would have been held discharged both at Law

(a) 2 Swan. 185,

and in Equity. The case of *Browne v. Carr* (a) rested on peculiar circumstances: the surety disputed his liability at law; he had been guilty of laches in not availing himself of his legal remedies, and there were other grounds peculiar to the nature of the certificate, which took the case out of the general principle. In *Boulton v. Stubbins* (b), cited on the other side, Lord Eldon expressly lays it down, that the creditor agreeing with the principal debtor to postpone his remedy, the effect is, that in equity the right against the surety is gone. It is in vain to say the indulgence may be for the benefit of the surety: another person has no right to judge what are the surety's remedies; and the original implied contract being, as far as the nature of the original security will admit, that the surety paying the debt shall stand in the place of the creditor. No payment here by the Respondent could have placed him in the situation of the creditor; for the deposits were redeemed, not at a price ascertained by public sale, but at the sum for which the deposit notes were drawn.

Suppose, however, such sum to have been the market value of the copper at the time of such transfer, the securities were for advances made prior to as well as at the time of their deposit; the Bank of Bengal ought therefore, at least, to have applied their proceeds, *pari passu*, to the discharge of the Respondent's Bills, as well as those of *Fergusson & Co.*; they did so with respect to the indigo and Company's Paper, which showed they were cognizant of the Respondent's equity. It is upon these principles that the Respondent was held entitled to the relief he sought by his Bill

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(a) 2 Russ. 600. S. C. 7 Bingh. 508.

(b) 18 Ves. 20, 21.

1842. in the Court below, and we submit that this Appeal
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The Right Hon. Dr. LUSHINGTON :

28th July
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This is an Appeal from the Supreme Court of Judicature at *Fort William*, and was brought under the following circumstances.

In the year 1832, *Radakissen Mitter* drew several Bills in favour of *Durponarain Gangooly* on Messrs. *Fergusson & Co.*, Merchants in *Calcutta*, who accepted the same. Those Bills being indorsed by *Durponarain Gangooly*, were discounted by the Bank of *Bengal*, and the value was paid to *Fergusson & Co.* The whole amount for which those Bills were originally given was S. R. 450,000. Those Bills were renewed from time to time, and, save a sum of S. R. 50,000, no money was paid in discharge of them.

In the month of *November* 1833, *Fergusson & Co.* failed. At that time the Bank of *Bengal* held five renewed Bills for S. R. 400,000, which became due and payable in *December* 1833, and *January* 1834.

On the 2nd of *September* 1833, the Bank advanced to Messrs. *Fergusson & Co.* the sum of S. R. 245,600, on a deposit, as a collateral security, of 10,000 maunds of *Chili* copper, valued at S. R. 327,500. The terms upon which this copper was deposited will require to be more particularly noticed.

On the 6th of *September* 1833, a further advance was made by the Bank to *Radakissen Mitter* of S. R. 73,700, on the security of 1,100 slabs of copper, valued at S. R. 98,275. This copper was deposited as a security upon precisely the same terms, with respect to *Radakissen Mitter*, as the copper deposited on the 2nd of *September* was with respect to *Fergusson & Co.*, and the advance was for the benefit of *Fergusson & Co.*

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On the 28th of *September* 1833, a further advance of S. R. 35,400 was made to Messrs. *Fergusson & Co.* by the Bank, on the deposit of 568 slabs of copper, valued at S. R. 47,200, and such deposit was made in the same terms as that on the 2nd of *September*.

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On the 26th of *November* 1833, Messrs. *Fergusson* presented their Petition to the Court for the Relief of Insolvent Debtors, and Assignees were appointed of their estate and effects. The first of the Bills drawn by *Radakissen Mitter* became due on the 10th of *December* 1833, and was presented to him for payment.

On the 27th of *December* 1833, *Radakissen Mitter* caused a notice to be served on the Bank to the following purport, that if the Bank should part with or pay over to the Assignees of *Fergusson & Co.* any securities or proceeds of securities held by the Bank for loans made to *Fergusson & Co.* on the Bills of Exchange drawn by *Radakissen Mitter*, the Bank would be held responsible, as *Radakissen Mitter* had derived no benefit from the Bills, and had become a party to them on the express understanding that the securities were ample, and should be applied in the first instance to the liquidation of the Bills.

On the 12th of *February* 1834, the Bank, upon the application of the Assignees, delivered up the three parcels of copper so deposited with them, upon payment by the Assignees of S. R. 366,109, being the amount of the principal and interest of the three sums advanced upon the security of the copper.

On the 12th of *August* 1834, the Bank brought their action against the Respondent, as drawer of the five Bills, for the balance due to the Bank, viz. the amount of the Bills, less the dividends, on a share in the said Bank, which had been held by *Fergusson*

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on behalf of his partnership, and less also S. R. 99,552. 1 a. 2 p., received on account of an order addressed in *September* 1833, to the Government Loan Committee by Messrs. *Fergusson*, and accepted by such Committee. This order required the Loan Committee to pay to the Bank of *Bengal* S. R. 130,000 from proceeds of indigo pledged to the Committee; and the Bank were to hold this money as a security for the five Bills, and also for a Bill drawn by Mr. *Colville*, accepted by Messrs. *Fergusson*, and discounted by the Bank.

In *November* 1834, the Respondent filed his Bill on the Equity side of the Supreme Court against the Bank and the Assignees of *Fergusson & Co.*, and prayed a perpetual Injunction against any further proceedings at law to enforce payment of the said five Bills. An Injunction till further order was obtained on the 9th of *February* 1835.

The Defendants to the Bill having appeared, and the cause gone through the ordinary stages, it was heard on the 13th of *July* 1838, before the Chief Justice and one of the Puisne Judges, there not being any other at that time in *Calcutta*. The Court was divided in opinion, and in such case the opinion of the Chief Justice being entitled to prevail, a Decree on the 13th of *August* was made conformable to his opinion, and the Bill was dismissed with costs as against the Bank of *Bengal*.

A Petition for rehearing having been presented, the cause was reheard on the 30th of *November* before the Chief Justice, Sir *John Peter Grant* and Sir *Henry W. Seton*, who, in the interval, had arrived in *Bengal*, and taken his seat.

By the Decree on the hearing, dated the 31st of *January* 1839, the Decree of the 1st of *August* was

reversed, and the Injunction made perpetual ; and the Bank was left to pay its own costs. From this Decree the Chief Justice dissented, and the Bank of *Bengal* brought the present Appeal.

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In these proceedings there are very many other circumstances set forth ; but as their Lordships are of opinion that their decision must be chiefly governed by the view they take of one question, this short summary may suffice to bring out so much of the case as they deem necessary.

It is perfectly clear that the Respondent, by drawing these Bills of Exchange, undertook, if the acceptors failed to pay, to make payment himself. Of the averment contained in the Bill, that the Respondent, by an understanding with the Bank, was to be relieved from all responsibility on account of his being the drawer of the Bills, there is no proof whatever ; and, therefore, any inference arising from such fact, if true, must be wholly dismissed from the case. At the time the Bills were originally drawn, it does not appear that the Bank held any security from Messrs. *Fergusson*, and therefore the engagement entered into by the Respondent to pay the amount of the Bills, if the acceptors did not, was wholly unconnected with any question of security. At a period, however, long subsequent to the drawing the first Bills, the Bank did take certain securities ; and it is on account of the manner in which the Bank dealt with those securities that the Respondent claims to be relieved from his liability to pay those Bills.

It will be necessary presently to advert to the terms of the documents whereby those securities were acquired, and afterwards the mode in which the Bank dealt with them.

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It is unnecessary to consider how far the Respondent obtained a right to the securities subsequently acquired,—securities neither given nor agreed to be given till a long time after the first Bills became due,—and whether he could acquire such securities without paying the debt. This may or it may not be, as far as the present question is concerned, because, assuming the affirmative of the proposition, the securities were, we think, justly dealt with.

Supposing the Respondent to have acquired a right to the benefit of the security, what was the extent of that right? We apprehend that the Respondent could in any view only take a right to the benefit of the security subject to the power which the creditor by the terms of the security was entitled to exercise. And this condition is no injustice to the surety, for whatever be the quantum of benefit he derives from the security, it is a benefit beyond that which he stipulated for when he originally became surety.

This security is given by a document to the following effect, in the form of a Promissory Note signed by *Fergusson & Co.*, dated 2nd *September* 1833. That firm, three months after date, promise to pay the Bank of *Bengal* S. R. 245,600, with interest as stated ; and the document states, that they have deposited in the Bank, as a collateral security, *Chili* copper valued at S. R. 327,500 ; “and in default of payment at the period above mentioned, we, *Fergusson & Co.*, hereby authorize the Treasurer of the Bank for the time being, absolutely to sell and dispose of the said *Chili* copper, for the reimbursement to the said Bank, as well of the said principal and interest at the rate aforesaid, as of all and every such other sum or sums of money, together with interest, as aforesaid, on or after the

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expiration of the said period, by public or private sale.''

There were two other parcels of copper deposited in *September* by documents similar in effect.

There is no apparent difficulty in the construction of this Instrument ; it is simply an obligation to repay a certain sum then advanced by the Bank, and the deposit of a certain quantity of copper to secure the payment of that debt and all other sums of money which might be then due, or might be advanced in the interval. The Instrument did not direct that the copper or the proceeds thereof should be applied preferentially in payment of any particular debt.

Such being the Instrument by which the security was given, the next consideration is, how did the Bank of *Bengal* deal with the security?

On the 26th of *November* 1833, *Fergusson & Co.* became Insolvent, and the Bills drawn by the Respondent became due in *December* and *January* following. On the 27th of *December* 1833, the Respondent gave notice to the Bank to retain the securities, claiming a right to have them first applied in payment of the Bills. The Bank retained the copper till the 12th of *February* 1834, when they delivered it over to the Assignees of *Fergusson & Co.*, on the payment of S. R. 366,000, which was the amount, with interest, of the special loans made by the Bank at the times of receiving the three parcels of copper.

The Respondent says that this copper was not sold, but was redeemed contrary to the terms of the Instrument, and that too at less than its real value ; and that, therefore, the security to which he has a claim has been diminished in value, and that the conduct of the creditor has relieved him from his obligation as surety.

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We are of opinion, that returning the copper to the Assignees on payment of its full value (assuming that fact for the present) is a disposition of it fairly within the terms of the Instrument, which gives to the Bank the right to sell or dispose of the copper by public or private sale. Such a disposition of the copper is a sale of it in all essential particulars. The Assignees are purchasers for a full consideration, and the Respondent, by this mode of dealing with the copper, does not suffer the slightest injury, nor are any of his rights infringed.

That the copper was sold for less than its value, there is no evidence whatever. The answer of the Bank was read, which distinctly states the contrary; nor is there any probability of the security being so sacrificed, for it was clearly the interest of the Bank to obtain the full value of it. It is true, indeed, that the copper was afterwards sold by the Assignees for a larger amount; but such sales took place at distant periods, and when the market had altered. On this ground we are of opinion that the Respondent is not entitled to relief.

It has, however, been further contended, that the Bank, having received the value of the copper, was bound to have applied it *pari passu* towards the liquidation of all the debts due from *Fergusson & Co.* to the Bank, including the five Bills. But we think that the Instrument creating the security, not directing it to be applied preferentially in payment of any debt, nor *pari passu* in payment of all debts, and the Assignees of *Fergusson & Co.* not requiring it to be appropriated in liquidation of any demand, the Bank had a perfect right to apply it towards the payment of the special loans. We think so upon the ordinary prin-

ciple which entitles a creditor, in the absence of any direction from the debtor paying, to apply the monies he receives to whichever of several debts arising he pleases. But it may be well to consider what would be the result if the proposition of the Respondent was true ; it would be this, that the Respondent would be relieved *pro tanto* by the *pari passu* application of the produce of this security acquired after he became surety ; and in the same proportion the Bank would be left without security for payment of a loan advanced by them long after the Bills were discounted, and on the faith of this very security. The Bank would to this extent be deprived, as to the Bills, of the benefit of the security they originally possessed. It is difficult to find any principle of Law or Equity which could support a proposition fraught with such consequences.

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With respect to the share which *Fergusson* himself held in the Bank, the dividends were applied in liquidation of these Bills—the share became the property of the Assignees. We see no reason to conclude that it was illegally dealt with, to the prejudice of the Respondent.

Their Lordships, therefore, are of opinion that the Decree appealed from must be reversed, and the Bill dismissed, but without costs ; thus leaving each party to pay their own costs.

It is right that I should add, that upon the present occasion, His Honour the Vice-Chancellor entertains some doubt with respect to this Judgment, and thinks that it would perhaps be more expedient that further inquiry should be instituted into the circumstances.

Decree reversed.

MAHA-RAJAH MITTERJEET SING, for
himself, and as Guardian of RAJAH
MOOD NARAIN SING, MEER ABD-
OOLLAH, and LALA BUNWAREE LAL, } *Appellants,*

AND

THE HEIRS OF THE LATE RANEE,
widow of RAJAH JUSWUNT SING } *Respondents.**

On Appeal from the Sudder Dewanny Court of Bengal.

Revenue sale—Procedure—Sale of whole taluka consisting of several mahals separately assessed to revenue in one lot—Legality—Excessive sale—If proper—Void sale—If can be validated by acquiescence and ratification—Purchaser's right to sale price on sale being set aside—Mode of accounts to be taken.

A *talook* consisting of 210 villages, but classed under the decennial settlement, for fiscal purposes, as 74 villages, and assessed at 74 separate *sudder jummas*, was sold by public auction by the Collector, in one lot, for arrears of Government revenue, at a sum greatly disproportionate to its value. The sale was made by order of the Board of Revenue but it did not appear that the Collector had informed the Board that the *talook* consisted of 74 villages, or that the Board had authorized the sale in one specific lot. The Board subsequently confirmed the sale. The surplus of the purchase-money, after satisfying the Government arrears, was received and appropriated by the *malguzar*. On a suit by the *malguzar* against the purchasers, to annul the sale, it was held by the Judicial Committee affirming the Decree of the Court below :—

I. That the act of the Collector in putting up for sale and consolidating the 74 villages as one lot, without the express authority of the Board of Revenue for the sale of such specific lot, was contrary to the Regulations, and illegal, and was not cured by the general authority given previous to the sale, or by the subsequent confirmation thereof by the Board.

II. That the sale being unauthorized, no implied adoption by the subsequent appropriation of the purchase-money could bar the *malguzar* from reclaiming the estate, on the restoration of the purchase-money.

III. That the retrospective operations of Reg. XI. 1822 did not apply

7th, 11th,
and 17th
Dec. 1841.

THIS was an Appeal from a Decree of the *Sudder Dewanny Adawlut of Bengal*, of the 29th of May 1832, affirming a previous decision of the Provincial

* Present : Members of the *Judicial Committee*,—The Lord President, Lord Brougham, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—The Right Hon. Sir E. Hyde East, and The Right Hon. Sir A. Johnston.

to a sale so circumstanced as this ; it being provided by clause 3, of sec. 6, that in order to prevent the sale being annulled, the Board of Revenue shall have actually given authority to proceed to the sale of the specific lot.

But the Courts in *India* having proceeded on the footing that the purchaser had been repaid, during the time he was in possession, by the perception of the rents and profits of the *zemindary*, did not direct the *malguzar* to refund the purchase-money, or call for an account of the mesne profits. Such part of the Decree of the Court below reversed, and an account directed to be taken in *India* of the rents and profits received by the purchaser, giving credit for permanent improvements on the estate; and as the purchasers were not responsible for the illegality of the sale, so much of the Decree of both Courts below, as condemned them in costs, reversed, and both parties ordered to pay their own costs in the Courts in *India* and in this country.

Court of *Patna*, of the 19th of *November*, 1825
whereby the sale of the *talook Belkhuruh*, in the
pergunna Urol, was annulled ; and the Appellants,
who were the purchasers, or had become co-sharers in
the *talook*, were decreed to deliver up possession to
the Respondents.

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The sale was made by order of the Board of Revenue, to satisfy arrears of revenue due to the Government from the late *Ranee*, the widow of *Rajah Juswunt Sing*, deceased, the former proprietor and *zemindar*.

The *talook Belkhuruh* consisted of 85 original (*aslee*) villages, and 125 hamlets or dependencies (*dakhilee*), amounting together to 210 villages and hamlets, each of these being rated in the Collector's books at a separate *jumma*, or revenue, to the amount in the whole of S. R. 24,748. 11 a. 10 g.

At the decennial settlement in 1197 *Fusly*, (1789-90 A.D.,) the amount of revenue payable to Government by *Rajah Juswunt Sing*, in respect of the villages and hamlets comprised in the above *talook*, (which was for fiscal purposes subdivided into 76 territorial divisions,) at separate *jummas*, amounted in the whole to S. R. 25,134. 4 a. 5 g. Accordingly, *Juswunt Sing*, with

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Government claims, and praying for delay in payment of one-half of the *jumma* for three years without interest. On the 2nd of *March* 1815 the *Ranee* presented a second petition to the like effect, but no orders were passed. Notwithstanding that these petitions were still unanswered, the Collector of *Bahar* caused an advertisement to be published, dated the 2nd of *May*, which was in the following form :—

“As the villages of the *pergunnas* of *zillah Bahar* will be sold at *Bankipoor*, at the *Sudder cutcherry* (office of the Collector) of *zillah Bahar*, by auction, according to the annexed statement, for the balances due to Government to the end of the *kist* of *Phagoon* 1222 *Fusly*, by the orders of the Board of Revenue, dated the 1815, on the 5th of *June* 1815, agreeing with the 13th of *Jeyt* 1222 *Fusly*, on *Monday* ; and after which, on other dates, until all the villages included in the advertisement be sold,—notice is hereby given, that whoever may wish to purchase the villages in the annexed statement, do attend at the date and day appointed at the said *cutcherry*, and purchase. The conditions of the sale are, that fifteen per cent. of the purchase-money be deposited immediately as earnest, and the balance be paid into the Treasury in eight days ; and if the purchaser do not pay the balance of the price in the said time, he shall forfeit the said deposit, and the villages purchased will be re-sold ; and if any loss accrue by the re-sale, the first purchaser shall pay it ; and if any gain, it shall go to the former *malguzar*.*

* The person paying the land revenue to Government, whether the owner, cultivator, or *zemindar*.

"Name of <i>mahal</i>	.	.	<i>Belkharuh.</i>	1841.
"Name of <i>malguzar</i>	.	{	The <i>Ranee</i> of the late <i>Rajah Juswunt Sing.</i>	MAHA- RAJAH MITTERJEET SING
" <i>Sudder jumma</i>	.	.	24,748 rupees, 11½ <i>anas</i> .	v.
"Name of <i>pergunna</i>	.	.	<i>Urol.</i>	THE HEIRS OF THE RANEE, WIDOW OF RAJAH JUSWUNT SING.
"Villages to be sold	.	{	<i>Belkharuh</i> , &c., seventy- four villages.	
"Balance of Government	.	{	12,742 rupees, 10 <i>anas</i> , 5 <i>gundas</i> ."	

It appeared that the above balance, or that part of the above balance which remained due at the time of sale, was due in respect of the *talook Ikhtiyarpoor Chuk Nundam*, situate in the *pergunna* of *Mussoora*, and not for any of the villages in *Belkharuh*, in the *pergunna Urol*.

On the day appointed for the sale, the same was postponed ; and, on the 5th of *June*, a second advertisement was issued, in the following form :—

"Formerly advertisements of the 2nd of *May* 1815
 "were published, that the villages of the *pergunnas*
 "of *zillah Bahar*, mentioned in the said advertise-
 "ments, would be sold on *Monday*, the 5th of *June*
 "1815, agreeing with the 13th of *Jeyt* 1222 *Fusly*,
 "for the arrears of the *malguzary* due to Government,
 "but that the sale would be suspended from that date
 "to 21st of *June* 1815, according to the orders of the
 "Board of Revenue ; and that on *Thursday*, the 22nd
 "*June* 1815, agreeing with the 1st of *Asarh* 1222 *Fusly*,
 "the sale of the villages, mentioned in the said ad-
 "vertisements, would take place at *Bankipoor* upon
 "the conditions stated in them,—notice is therefore
 "given, that purchasers attend on the 22nd of *June* of
 "the said year at *Sudder cutcherry* at *Bankipoor*, and,
 "if the sale of the villages take place for arrears, that

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“they purchase on the conditions stated in the former
“advertisements.”

Neither the names of the villages, the extent of the lands, the amount of arrears, or the name of the *malguzar*, as required by Reg. XVIII. 1814,* were stated in this advertisement; nor was it published at any of the villages advertised for sale; nor was any notice thereof or any copy given to or served upon the *Ranee*; but it was forwarded and suspended in the Courts at *Patna*, in the *Zillah* Court of *Bahar*, and in the *Zillah* Court of *Ramgar*: and the *Ranee* was alleged to have had notice thereof through one *Chuman Lal*, her agent, who was present at the *cutcherry* (or office of the collector) on the day in question.

On the day this second advertisement was issued, the *Ranee* paid into the Collector's office the sum of R. 6,297. 4 a., on account of the arrears; and, on the 19th of the same month, the further sum of R. 3,673, amounting together to the sum of R. 10,026, 4 a., leaving a balance only of R. 2,716. 6 a. 5 g. due on account of the arrears mentioned in the original advertisement of the 2nd of *March* 1815.

Notwithstanding these circumstances, the Collector proceeded, on the 22nd of *June*, to the sale of the whole of the property advertised, and inserted a *rubakary* (or registry) of the sale in the records of his office, to the following effect: “The *talook* of *Belkharuh*, *pergunna* of *Urol*, at the *sudder jumma malguzary* of twenty-four thousand seven hundred and forty-eight *rupees*, eleven *anas* and a half, has been sold for the arrears of *malguzary* due to Government. *Hurdial Sing*, the agent of *Maha-rajah Mitterjeet Sing, Bahadur*, bought it for one *lac* and ten thousand *rupees*.”

* Rescinded by clause 1, sec. 2. Reg. XI. 1832.

It appeared from the evidence in the cause, that the sale was taken out of its turn, and that, at the time of the sale, the *talook* was worth nine or ten *lacs* of *rupees*.

On the 25th of *June*, the *Ranee* presented a petition to the Judge of *zillah Bahar*, complaining of the irregularity of the sale, and praying that the same might be annulled. She also presented another petition to the acting Collector, alleging collusion by *Maha-rajah Mitterjeet Sing*, and other persons, and requesting, among other things, that these petitions might be transmitted to the Board of Revenue, with the statement of the sale.

On the 29th of *June* 1815, the *Maha-rajah*, the only person who, at the time of sale, was declared to be the purchaser, presented the following petition to the Collector of *Bahar*:—

“The whole of the *talook* of *Belkhurūh*, *pergunna Urol*, *aslee* and *dakhilee*, the property of the *Ranee* of the late *Rajah Juswunt Sing*, the *malguzary jumma* of which is twenty-four thousand seven hundred and forty-eight *rupees*, eleven *anas*, ten *gundas*, was sold on the 22nd of *June* 1815, for the arrears due to Government; your petitioner bought it through *Hurdial Sing*, his agent, for *Baboo Mood Narain*, his successor (and youngest son), a minor, and *Meer Abd-Oollah* and *Gokul Chund*, at the price of one *lac* and ten thousand *rupees*, which was paid in full on the 28th of the same month, into the public treasury; and the shares of the aforesaid persons have also been received. It was necessary to inform you of this, that orders may be given to have the names of *Baboo Mood Narain Sing*, *Meer Abd-Oollah*, and *Gokul Chund*, inserted under the head of purchasers at the sale; and a deed of sale, and *perwanna*, and *amil-dastak*, be granted in

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their names, according to the annexed statement: 210 villages (85 *aslee*, 125 *dakhilee*), according to the sale-price."

The Collector, on the same day, made an order on this petition, declaring that, when the sale had been confirmed by the *Sudder*, the names of the several sharers therein mentioned would be inserted in the office.

In pursuance of the order made by the Collector on her former petition, the *Ranee* presented three further petitions to the Board of Revenue, complaining of the irregularity of the sale, and its excess in quantity. The Board, however, after corresponding with the Collector, expressed themselves satisfied of the validity of the sale; and by an order of the 15th of *August* 1815, confirmed the same to the Appellant.

On the day following (16th *August* 1815), the *Ranee* presented a further petition to the Board of Revenue, to which no answer was returned; and, on the 1st of *September* (1815), the acting Collector ordered an *amil-dastak* (or order giving possession of the *zemindary*) to be granted to the *Maha-rajah*, in confirmation of the sale; and, on the 2nd of *September* 1815, granted a *sunud* (or deed of sale), directed to the inhabitants of the *talook* of *Belkhuruh*, commanding them in future to consider the *Maha-rajah* the proprietor and *malguzar* of the said *talook*, and to settle the *malguzary* with him without any dispute or contention.

On the 4th of *September* 1815, *Hurdial Sing*, as agent of the *Maha-rajah*, presented a petition to the Collector, praying the aid and interference of Government, to quiet the purchaser in the possession of the purchased estate. Upon this petition it was ordered, that a notification be made, according to clause 5, sec. 29,

Reg. VII. 1799, for the entry of the sale-purchaser; and that a *perwanna* be issued to the *vakeel* of Government, according to rule, to present a petition to the *Zillah* Court for the same purpose. In the course of the proceedings which were subsequently held before that Court, with reference to the purchaser's being in the quiet possession of his purchase, it was, on the 4th of *December* 1815, ordered by the Court that the record-keepers of the collectorate of *Bahar* should send a statement of the *talook* of *Belk-huruh*; and, in compliance with this order, a special report, dated the 19th of *December* 1815, was made, setting forth the nature, title, and description of the *talook*, as it appeared in the official documents; and the report contained also an account of the sale, and the circumstances under which it was effected.

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Upon this report the Judge of the *Zillah* Court, by an order dated the 13th of *January* 1816, suspended the transfer of the property to the auction-purchaser until further inquiry, and directed that the *talook* in question should remain in the possession of the *Ranee*; and that the collector should hold in deposit the *malguzary* of the *talook* that might be paid by the parties.

Previous to the last-mentioned order of the *Zillah* Court, and on the 5th of *January* 1816, the *Maharajah* presented a further petition to the Collector of *Bahar*, praying that he might be put into possession of the property; and, on the 15th of the same month, *Meer Abd-Oollah* also presented a petition to the same effect, so far as related to his alleged share of the purchase. An order was made in this petition by the Collector on the same day, whereby it was ordered that a *perwanna* be issued to the *Maha-rajah*,

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VII. 1799; and the describing the annual *malguzary* of R. 24,748. 11½ a., to be of 74 villages, was both false and fraudulent, calculated to mislead, and erroneous in description. That there was no balance due till *Phagoon* (*February* and *March*), and therefore the sale was irregular; and that the carrying the sale into effect out of the regular number was contrary to sec. 26, Reg. XIV. 1793, and repugnant to the rules and usages of the superior authorities. That the *dakhila* (receipt) of the 20th of *June* stated the amount of *amdany* or revenue, paid in on the 5th of *June* at R. 6,297, while the *sarrishtahdars* of the office, in their statement, mentioned only R. 1,632. 2 a. 5 g., as received for *amdany* on that day. That the Collector had not made himself acquainted with the receipt and balances of *malguzary*, as he was bound to do, before he ordered a sale; and that if an inquiry had been made into the amount received, the sale would have been prevented. That the agent of the *Ranee* offered at the time of the sale to pay in the balance due, but was refused. That *Hurdial Sing* was not authorized to bid at the sale on the part of the *Maha-rajah*, no *mokhtar-namah* (power of attorney) having been executed to him; and, without such, he was unable to purchase. That the contradictory statements of who the real purchaser was at the sale, and the petitions presented by *Hurdial Sing*, and *Meer Abd-Oollah*, and *Gokul Chund*, stating their purchase at the sale proved collusion and combination between *Meer Abd-Oollah* and *Baboo Byjnath Sahoo*, the cash-keeper of Government, and the *Maha-rajah*, and rendered the sale invalid, according to sec. 15, Reg. II. 1793; and that the sale was not only a fictitious one, but that it was a purchase by the officers of the Col-

lector, both of which were prohibited. That the villages of *pergunnas* *Urol* and *Mussoora* were more than a hundred lots, and the matter must fall under one of two cases. That they must have considered the villages of both the *pergunnas* as one lot, or as two lots: if two lots, the amount of the receipts and balance of *malguzary* should have been of each lot; and if the lots were separate, there would have been no balance against the villages of *Urol*; and that to break the lots without performing the conditions of Reg. XXV. 1793, and Reg. I. 1801, was contrary to the Regulations; and if the lots were broken, only such portions should have been sold as would have paid the *malguzary*, and not more; and in case there was a demur to the balance on the part of the proprietor and *zemindar*, it was not proper to make the sale without removing that demur. That the *perwanna* to the Appellant, and the statement of the purchasers, claiming as partners, proved that the sale was a fictitious one, and that the Collector well knew the same. That the balance given out at the sale was infinitely greater than the truth; and the sale was for 74 villages of the *pergunna* of *Urol* (without stating names), at the enormous jumma of R. 24,748. 11½ a., and, after the sale, an *amil-dastak* was given for 210 villages; that these could not have happened but by the fraud and collusion of the *mutsuiddies*, or clerks of the Collector: for all which reasons the Plaintiff prayed that the sale might be reversed, and possession given to her of the 210 villages stated in the Collector's *sunud*, or deed, together with R. 74,246. 2½ a., the amount of *malguzary*, and R. 25,753. 13½ a., making altogether the sum of one *lac* of *rupees*.

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On the 25th of *October* 1818, the *Ranee* died ; and *Ghirdharee Sing* and others were ultimately admitted, as heirs, to prosecute the suit (a).

After various proceedings and orders of the Court to compel the Government and the other Defendants to put in answers, the *Maha-rajah*, on the 5th of *December* 1821, filed his answer, on behalf of himself, and as guardian of *Mood Narain Sing*, his son, a minor, wherein he denied generally the allegations contained in the plaint, and insisted that the sale of the *talook* in question was valid and according to the existing Regulations, such sale having been duly advertised; and he alleged that the purchase was neither collusive or fictitious, the fact being “ that he (the *Maha-rajah*) was the original purchaser, and that he made *Meer Abd-Oollah* and *Gokul Chund* partners after the purchase.”

The cause came on for hearing on the 26th of *January* 1822, and no answer having been put in by the Government, an order was made that the Government *vakeel* should apply to the Collector for an answer to the plaint.

On the 22nd of *July* 1822, a replication was filed to the answers of the *Maha-rajah* and *Meer Abd-Oollah*. To this replication the *Maha-rajah* and *Meer Abd-Oollah* filed rejoinders.

On the 27th of *November* 1823, the *Maha-rajah* filed an amended answer to the plaint; he insisted, first, that the Collector was authorized in proceeding to the sale of the *talook* in question by the 3rd sec. of Reg. V. 1796, the 7th sec. of Reg. I. 1801, and the

(a) See *Keerut Sing v. Koolahul Sing*, 2 Moore's Ind. App. Cases, 331. See also *Ghirdharee Sing v. Koolahul Sing*, ib. 344.

25th sec. of Reg. V. 1812: secondly, that the entry of the 20th of *June*, of R. 6,297. 4 a., alleged to have been paid by the *Ranee* on account of the arrears, for which the *sarrishtahdars* had not given her credit, was obtained by favour of the officers of the Collector, and contrary to the established rule: and thirdly, that there was no breaking of a lot, against which Reg. XXV. 1793, and Reg. I. 1801, provides; but that the sale was effected pursuant to 25th sec. of Reg. V. 1812, and, under the circumstances in which the property had been placed, was conformable to the 3rd sec. of Reg. V. 1796, and 7th sec. of Reg. I. 1801.

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To this amended answer a replication was filed on the 13th of *January* 1824, and the Defendant, the *Maha-rajah*, rejoined.

Various urgent applications and orders were addressed by the Court to the Collector, to put in the answer of Government, which, it appeared, was delayed by the circumstance of the papers in the case being under the consideration of the Governor-General in Council. The result of the deliberation of the Governor was, however, a determination not to defend the suit on the part of the Government.

On the 14th of *September* 1822, the Collector of *Bahar*, Mr. *Wigram Money*, in answer to a reference by the Board of Revenue of the Central Provinces, reported his opinion that the legality of the sale could not be defended; and the Board reported their disapprobation of the whole proceeding in the strongest terms. The Governor-General in Council adopted their view of the case as to the illegality and injustice of the sale, and intimated, that if the purchasers could not be in-

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duced to renounce their purchase, the Respondents should be furnished with stamp paper free of expense, to prosecute their suit for annulling the sale.

On the 13th of *August* 1824, the following *perwanna* from the Collector was addressed to the Government *vakeel*, by order of the Governor-General in Council:—
“In the case of the *Ranee*, the wife of the late *Juswunt Sing*, against Government, and the purchasers of the sale of the *talook Belkhuruh*, of *Urol*, for the reversal of the sale, do you represent to the said Court that an answer on the part of Government to the plaint, desiring that the sale be affirmed, is unnecessary, and that the Court may decide upon the case according to justice.”

On the 9th of *April* 1825, *Gokul Chund* filed his answer to the plaint, insisting on the validity of the sale, denying that there was any collusion between the officers of Government, and contending that, as the Governor-General and Board of Revenue had rejected the petition of the *Ranee* for rescinding the sale, she was precluded by the 3rd clause of sec. 6, and 1st clause of sec. 7, and by sec. 27, of Reg. XI. 1822, from instituting any suit to annul the sale; he also alleged, that he had sold his interest to the Appellant *Lala Bunwaree Lal*.

To this answer the Plaintiffs replied.

The cause being at issue, documentary evidence was produced on behalf of the Plaintiffs, consisting of copies of the old books of settlement of the villages in the *pergunnas* of *Urol* and *Mussoora*; extracts from the *towjee* (monthly) accounts of *kists* (revenue) and payments on account of collections; the original petitions of the *Ranee*, for indulgence in payment of the revenue due in 1815; the first and second advertise-

ments for the sale ; the proceedings of the Collector, recording the purchase of the *zemindary* in question ; the *sunud*, or deed of sale ; certain proceedings of the Collector of *Bahar*, annulling the sale of other villages, and of the *Zillah* Court, suspending the transfer of the property to the auction purchasers ; and the final orders of the Government respecting the defence of the suit.

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The Defendants also produced documentary evidence, consisting, among other things, of the original *perwanas* to the *Maha-rajah* and other *zemindars*, requiring them to sign *kabooliats* for their entire *zemindaries* ; the agreement of the *Ranee* to pay the full assessment on her *zemindary* ; her *mokhtar-namah* in favour of *Puhulwan Sing* ; the *kabooliat* or lease of the *Ranee's* *mokhtar* for the *pergunnas* of *Urol* and *Mussoora* ; invoices of remittances and treasury receipts for monies paid in on account of the revenues of those *pergunnas* ; the original statement of the Collector of *Bahar* to the Board of Revenue, of lands in that *zillah* proposed to be sold by the Collector on the 5th of *June* 1815 ; the advertisements for the sale ; the *kabooliat* of *Puhulwan Sing*, on behalf of the *Ranee*, already stated ; the several petitions on behalf of the alleged purchasers, for admission to the lands purchased, and the orders thereon ; the petition of the *Ranee* for the annulling the sale ; and the correspondence between the Board of Revenue and the Collector ; the report of that Board to the Government, and the answer thereon ; together with copies of the monthly accounts of the collections of the *mahals* in *zillah Bahar*, from *June* 1815 to *June* 1820.

In consequence of a letter from the Court of the 18th *July* 1825, various documents were sent up by

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the Board of Revenue and the Collector of *Bahar*, consisting of reports made by the *vakeel* of Government of the City Court of *Patna*, on the mode in which the sale had been advertised, the proceedings of the Collector recording the sale, and the various petitions presented by the Defendants for the transfer and possession of the property, according to their respective claims.

Nine witnesses were also examined on the part of the Defendant, *Meer Abd-Oollah*, respecting the due publication of the advertisements, and the notice given thereof to the *Ranee*; and the *vakeels* of Government were examined upon interrogatories to the same points by both the Plaintiff and Defendants.

The proceedings relative to the defence of the suit, on the part of Government, were also put in with the interlocutory petitions and orders made in the progress of the suit, together with a petition of the Appellants of the 12th *July* 1825, submitting observations on the sufficiency of the second advertisement, and the *rubakary*, or proceeding of the Court, inquiring into the publication thereof, of the 16th *July* 1825.

On the 19th *November* 1825 the cause came on to be heard before the Provincial Court of *Patna*, when the Judges, having gone minutely into all the circumstances of the case, gave judgment in favour of the Plaintiffs; and ordered that the Plaintiffs, *Ghirdharee Sing*, *Neemdharee Sing*, *Doorgpal Sing*, *Koolahul Sing*, and *Duryao Sing*, should obtain possession of the villages in dispute with their co-heirs, and that their names and shares should be inserted in the office of Government by a precept to the Collector; that the Plaintiffs should pay into the Treasury the sum of R. 2,716. 6 a. 5 g., the balance after the receipt of

R. 10,026. 4 a., on account of the balance of *mal-guzary* due to the end of *Phagoon*, with interest ; and the Court declared as follows :—“ As it is probable that the purchasers have realized more than the price of the sale, with interest, from the profits of the villages in dispute, it is not thought necessary to give any order to return the sale-price in this case. Either of the parties who may think there is an excess of money due, may sue to realize it. As the sale was effected by the combination and misrepresentations of the officers and purchasers, and the council (i.e. the Provincial Council of *Patna*), upon the report of the Collector and letter of the Board, when an answer of Government to the plaint was required, considered the sale to be improper, and advised it (the *talook*) to be returned, with which the purchaser would not comply, and on which account Government refused giving an answer to the plaint of the late *Ranee*, no blame is attached to Government. The whole costs of both parties are therefore to be paid by the purchasers.”

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From this decree the *Maha-rajah* appealed to the *Sudder Dewanny Adawlut* of Bengal. The Provincial Court of *Patna* transmitted his appeal, together with a separate petition of the Appellant *Bunwaree Lal*, praying to be admitted to appeal in the place of *Gokul Chund*, whose interest he had purchased, and was in possession of his share of the *talook* in question.

The Appellant, the *Maha-rajah*, having presented a supplemental petition to the *Sudder* Court, setting forth that the Provincial Court had refused to examine certain witnesses, whose evidence was of importance to his case, an order was thereupon made, directing the transmission of the papers to the Judges

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of the Provincial Court, and ordering them to take the depositions of the witnesses named by him, and any further evidence which he or any other of the parties should produce to prove their claim.

In pursuance of this order the Provincial Court directed the writer of the Court to take the depositions of the Appellants' witnesses as they should attend.

The Appellant *Bunwaree Lal* submitted a list of documentary and oral evidence to the Provincial Court, which he desired to produce ; and which he was permitted to prove.

The cause ultimately came on to be heard by the *Sudder Dewanny Adawlut* on the 13th of *March* 1832, and the hearing was continued on the 19th, 20th, 26th, and 27th days of the same month. On the 2nd of *April* the cause again came on, when the Court adjourned the proceedings, for the purpose of examining certain cases cited by the Appellants and Respondents as precedents ; the decisions in which were ordered to be returned from the office, together with copies of certain letters regarding the promulgation of Reg. XI. 1822, which had been also insisted on.

On the 24th of *April* 1832, the cause was finally disposed of, when judgment was pronounced by Mr. *Henry Shakespear* in favour of the Respondents, thereby confirming the decision of the Provincial Court of *Patna*.

On the 29th of *May* 1832, the final decree was made, in which the following reasons were given in support of the decisions of both Courts rescinding the sale :—

“First. According to the papers of the settlement of 1197 *Fusly*, the sale of one or two villages of the

talook in dispute would have been sufficient to realise the arrears due to Government.

“Second. By the Regulations in force at the time of the sale, it was necessary for the Collector to select one or two of the said *mahals*, and to refer to the Board for permission for their sale, and not for the sale of the entire *talook*.

“Third. In the first advertisement, no particulars of the villages for sale were mentioned, as they should have been.

“Fourth. If the names of all the *aslee* and *dakhilee mahals* had been mentioned, the *talook* would have sold for twice or thrice as much as the sale price.

“Fifth. The second advertisement, postponing the sale, was not published at the villages for sale, according to sec. 5, Reg. XVIII, 1814.” And the decree of the *Sudder Dewanny Adawlut* then proceeded as follows:—“Upon those grounds of the Respondents, proved by the papers, and upon consideration of the circumstances stated in the decision of the Provincial Court of *Patna*, dated the 19th of *November* 1825, for the reversal of the sale, it appears to be just and proper, upon every principle of justice, to declare that the sale in dispute was unnecessary, improper, and contrary to the Regulations: unnecessary, because there would have been no objection to the sale of one or two *mahals*; improper, and contrary to the Regulations, because by Reg. XI. 1822, the Regulations regarding sales, previous to the promulgation of that Regulation, have suffered no change or alteration. And in sec. 3, Reg. XIV. 1793, it is ordered, that if arrears of *malguzary* become due by a proprietor of land, a portion of the lands of the defaulter should be sold in proportion to the arrears, after ascertaining

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the wishes of the Board. In sec. 2, Reg. V. 1796, it is stated, that when a sale of lands becomes necessary, the Collector should with the utmost care select such portion of the lands as would, according to the statement in his possession, and the usual price of such lands, be sufficient for the arrears of Government, etc., and not more. In sec. 3, Reg. VII. 1799, it is stated, that 'the Board shall be responsible that sales are effected with the greatest care, and in a proper manner; and especially take care that Collectors select lands for sale in the most proper manner, and fix the *jumma* according to the Regulations.' When sec. 2, Reg. V. 1796, was amended by sec. VI. Reg. I. 1801, a further power was given to the Board, that whenever they consider the amount of arrears may be realized by a sale of lands, and that, compared with the value of the entire lands, a small excess only may arise by the sale of the entire lands, they are at liberty to have those lands sold, according to the Regulations. Moreover, by clause 2, sec. 29, Reg. VII. 1799, it is necessary that, for the information of purchasers, the lands for sale should be described at the time of sale, particularly according to the *mahals*, besides the expenses of the collections of the preceding year, and the *sudder jumma*, in such manner as to promote the sale, as far as possible, with propriety; and by sec. 9, Reg. I. 1801, it is clear that, whenever a sale of entire lands becomes necessary to realize arrears, it is requisite that, at the time of sale, their names, and the name of the *mahal* to which they belong, should be stated, according to the *quinquennial* register, and the amount of the *mokur-rery jumma*; but in the sale of the *talook* in dispute, neither the acting Collector, nor the Board, who are

the protectors of the rights of defaulters, have paid attention to the provisions of the aforesaid Regulations: on the contrary, by the statement of the acting Collector, dated the 4th of *August* 1815, a suspicion arises that the said Collector referred to the Board for a sale of the lands, without ascertaining the amount of arrears or value of the lands, and without knowing that nearly the whole of the arrear for which the first advertisement was made, was paid before the day of sale, and effected the sale; from which the negligence of the officers of the Collector is evident: whereby a strong suspicion is created, that the sale of the *talook* was not effected without their collusion and artifices. In the Persian translation of cl. 3, sec. 6, Reg. XI. 1822, it is stated, that sales before or after the promulgation of that Regulation shall be valid, and not liable to be annulled, provided the order of the Board had been given for the sale of all the lots which were sold, even should any error have been made by the Collector or the Board; but such an error relates to the statement of the Collector, or orders of the Board thereon, and not to inquiries and measures which, by the Regulations in force, are for the preservation of the rights of defaulters, and for the regularity of sales. In this case it is evident, that if the acting Collector had advertised the particulars of the lands for sale at the time of the sale, the said lands would have sold for two or three *lacs* of *rupees*, of which the sale by *Gokul Chund*, as alleged, of his four *ana* share for sixty-five thousand *rupees*, to *Bunwaree Lal*, Appellant, two years and a half after the sale, if it be true, is a strong proof. Regarding the second advertisement, although by the depositions of the witnesses, which were taken by the

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order of this Court, it is certain that the *Ranee*, the widow of *Rajah Juswunt Sing*, was informed by her agent of the sale being postponed to the 22nd of *June* 1815, yet the advertisement was not published as required by sec. 5, Reg. XVIII. 1814, and the plea of the Respondent on this ground cannot be rebutted. Independently of this, according to justice and the circumstances above stated, and the decision of this Court in the case of Government and *Bal Dut Doobey*, Appellants, (No. 1,766, on the 17th of *January* 1820), it is most proper and necessary that the sale in dispute should be reversed, and, according to the decision of the Court, that the Respondents immediately, on paying the sum of two thousand seven hundred and sixteen *rupees*, six *anas*, five *gundas*, the balance due to Government, with interest from the date of sale, be put in possession. But be it not understood, that the sale in dispute has been reversed on account of the sale price of the lands much exceeding the arrears of *malguzary* due by the proprietor; for, according to sec. 25, Reg. V. 1812, it would not be a sufficient ground to reverse the sale: but be it known, that the real ground for the reversal of the sale of the *talook* in dispute is this, that although the *jumma* of every *mahal* of the *talook* was separately entered in the settlement of 1197 *Fusly*, the Collector did not refer to the Board for the sale of a portion of the lands of the defaulter, sufficient to discharge the arrears due to Government; and it is still more wonderful that in the advertisement for the sale of the entire *talook*, the name and *jumma* of each *mahal* belonging to it was not mentioned, as ordered by the Regulations, and in consequence which omission a great loss has been sustained by

the Respondents.—Ordered, therefore, that the decision of the Provincial Court, dated the 19th of November 1825, be in every respect affirmed, and all the costs be payable by the Appellants, and the Respondents be put in possession immediately, on paying the sum of two thousand seven hundred and sixteen *rupees*, six *anas*, five *gundas*, the balance due to Government, with interest from the date of the sale.”

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From this decree the Appellants appealed to his late Majesty in Council.

Mr. *Pemberton*, Q.C., and Mr. *Jackson*, for the Appellants, *Maha-rajah Mitterjeet Sing*, and *Meer Abd-Oollah*.

By the decree appealed from, the sale of the *talook* is set aside principally on the ground that the provisions contained in the *Bengal Regulations* authorising sales of land for arrears of revenue have not been complied with. The main questions which arise are—*first*, the propriety of the selection of the entire *talook* of *Belkhuruh* by the Government for the arrears of revenue; *secondly*, the validity of the advertisements and sale statement; *thirdly*, the assumed invalidity of the sale under Reg. VII. 1799, sec. 29, cl. 3, by reason of the purchase being made fictitiously; and *lastly*, whether the *Ranee* had not so acted, by the appropriation of the purchase-money, as to preclude the Respondents from objecting to the sale.

I. It is admitted that the *Ranee* held the *talook* in *zemindary* tenure, and that one of the incidents of this tenure by Reg. I. 1793, by which the title of the *zemindars* was originally recognised, is, that the lands are liable to sale if the revenue assessed upon them

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shall fail to be duly paid. When this event happens, the revenue authorities proceed to a sale of the whole or a part of the *zemindary* in arrear, the purchase-money, or so much of it as may be necessary, being applied in satisfaction of the arrear due from the defaulter; the question then is, whether, in this case, the selection of the entire *talook* was a justifiable exercise of the discretion vested in the revenue authorities. *Kirt Chunder Roy and others v. The Government* (a) is conclusive. In that case your Lordships held, that no excess in the value of lands sold, over the arrear of revenue due, would vitiate the sale, the Government having, by Reg. V. 1812, an absolute discretion to sell either the whole or any part of the estate for arrears, without reference to the probable produce of the sale. In delivering judgment, Mr. Baron *Parke* says, in reference to that regulation (b)—“It is impossible to find language better calculated to do away with all objections on the ground of excess as to the validity of sales made by order of the Revenue Board, under the sanction of the Governor-General, when an arrear exists.” Here an arrear is clearly proved to have been due. But it is objected by the Respondents that the selection of so large an estate as the *talook* of *Belkhuruh* for sale for the arrears was a violation of the spirit of the Regulations. The contrary is the fact. The acts of the *Ranee*, in her dealings with the Government, and by the execution of the *kabooliat*, had constituted the 74 villages into one joint estate. It was separately registered from the other property of the *Ranee*, and was, in fact, a *pergunna* property. It is a rule to preserve the *pergunnas* and other local divisions entire, whenever it is prac-

(a) 1 Moore's Indian Cases, 383.

(b) *Ib.* 408.

licable: sec. 7, Reg. I. 1801. In conformity with this established practice, the selection of the entire *talook* was proper, unless there were any circumstances rendering it imperative to break up the *talook*. The propriety or expediency of the latter step has not been shown in these proceedings; and we submit that the selection of this *talook* for sale was a proper exercise of the power vested in the revenue authorities; that this discretion was judicially exercised; and that even if it were otherwise, no want of discretion merely, on the part of the Board of Revenue, of which the Appellants, as purchasers, were necessarily ignorant, can, either under secs. 24 and 25 of Reg. V. 1812, or on any other grounds, affect the validity of their purchase in a court of justice.

II. If the selection were proper, has any circumstance subsequently occurred which rendered the sale inoperative and void? To the first advertisement two objections are raised by the Respondents; *first*, that it is an inaccurate description of the property; and *secondly*, that it is incorrect in form. It is important to ascertain the principle upon which this advertisement was framed, and the facts by which its accuracy and sufficiency must be determined. To avoid disputes between the Government and the purchasers, the practice is to introduce into the advertisement only the name of the principal village or place, giving its appellation, in the district about to be sold. This is stated in the evidence to be the custom of the office. The information thus afforded was always found sufficient; for, unlike private property, the boundaries and particulars of which are matters of merely private interest, the divisions of these *zemindaries* are public and territorial. The actual divisions themselves are matters of

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general notoriety and universal concernment. This, with the amount of the *jumma*, or revenue assessed upon the property for sale, and the name of the *mahal* and *malguzar*, conveys all the general information relating to the property which is necessary or useful in an advertisement. Reg. XIV. 1793, which prescribes the form of the advertisement, does not require that any detailed particulars should be set out, other than were given in this advertisement. Reg. XVIII. 1814 is to the same effect. As the Regulations then require no detailed particulars of the property about to be sold, it is necessary to inquire whether there was a misdescription in the first advertisement. The description of 74 villages, as mentioned in the decennial settlement, and described in the *kabooliat* of the *Ranee* as 74 *jummas*, was correct. The description, after the *pergunna* had been transferred to the *zillah Shahabad*, as 210 villages, namely, 85 of *aslee*, and 125 *dakhilee*, was erroneous. This property was only recorded by 74 names, paid only 74 *jummas*, and was divided into 74 known and established local divisions. The advertisement, therefore, was right in describing it as 74 *mouzas*. Secondly, it is contended that the advertisement is incorrect in form, because the names of the villages are improperly described. This we have already shown is not required by Reg. XIV. 1793. And further, that the hour of sale is not mentioned, conformably to the 26th sec. of that Regulation. This objection was not urged in the Courts below; but surely such omission could not invalidate the sale. Some of the provisions of the Regulations are merely directory. Thus in the case of the *Collector of Benares and others v. Cosa Gir & Raj Gir (a)*, the

(a) 3 Mac. Sud. Dew. Rep. 88.

Regulations relating to revenue sales provide that on the purchase of the property, the purchaser shall deposit five per cent. The purchaser in that case did not deposit five per cent. on the day of sale, and the Court held that the failure to fulfil that condition was not sufficient to invalidate the sale.

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With respect to the second advertisement, it is material to bear in mind that the *Ranee* made no objection to it either before or at the sale. Sec. 5, of Reg. XVIII. 1814, does not apply. The postponement was granted to the *Ranee* as an indulgence, and, therefore, did not occur through one of the unavoidable causes which that section has in view. Indeed, there existed no necessity for issuing the second advertisement. *The Collector of Bareilly v. Major Hearsey* (a). The proceedings with regard to the notice of the sale were in every respect regular, and within the terms of sec. 7, cl. 4, Reg. XI. 1822, which is retrospective.

III. The question whether the purchase was fictitious is wholly irrelevant as between the Appellants and Respondents, for that question cannot arise unless there be a valid sale, divesting the property of the latter, and then it arises only between the Government and the purchaser. It is obvious that if the purchase had been fictitious, it was a penal matter, which Reg. VII. 1799 places exclusively within the cognizance of the Governor-General in Council. The charge that the sale was promoted and induced by the fraudulent practices of the native officers of the Collector, in concert with the Appellants, the purchasers, is without

(a) 3 Mac. Sud. Dew. Rep. 245.

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foundation. It was not a fictitious sale, neither was it a purchase by a Government officer. [Mr. Serjeant *Spankie*—We do not insist on that ground of objection.] It will be then unnecessary further to argue it.

IV. The application of the purchase-money to the use of the *Ranee*, at her request, precludes any subsequent question of the validity of the sale as between her and the purchasers. This should be looked at, with reference to two distinct periods of time. During the period the *Ranee* was in possession, and appropriated the purchase-money to her own purposes, her conduct, if she meant to complain of the sale, was fraudulent. After she lost possession, and still continued to appropriate the purchase-money, it amounted to a waiver and abandonment of all objection to the sale. It might not be inconsistent with any step which the defaulter might subsequently take to recover from the Government compensation for an improper exercise of its authority, if such had taken place; but as between the *Ranee*, who was divested of the estate, and the purchasers, we submit that the acceptance of the purchase-money is conclusive; for it is impossible that a party can be at the same time owner of the estate and entitled to hold the purchase-money also.

It is impossible to support the Judgment of the Courts below upon these grounds. It was a grievous injustice to set aside the sale, turn the purchaser out of possession, and assume, as the decree does, that he had realized the amount of his purchase-money, with interest at 12 per cent. during the fifteen years he was in possession. The decree is, in principle, erroneous: proceeding on the footing that the Government officers have conducted themselves illegally and indiscreetly in the conduct of the sale, it declares them free from

blame, and decrees the purchaser to lose his purchase-money. It is utterly inconsistent with every principle of justice and law to throw upon the purchaser those consequences which are attributable entirely to the Government officers, with whom the purchaser had no connection, and by whose acts, according to the law in any other country, the purchaser ought not in any degree to be affected.

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Mr. *Miller*, Q. C., for the Appellant, *Lala Bunwaree Lal*,

Having the same interest as the other Appellants in maintaining the sale, did not address their Lordships.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents, the heirs of the deceased *Ranee*.

This sale was properly avoided. It is quite clear a very large estate has been sacrificed for very small arrears due to the Government. The *talook* was worth nine or ten *lacs* of *rupees*, and one of the hardships under which the *Ranee* laboured was the extreme undervalue for which the property was sold.

I. The question of property on the part of the Collector, in selecting the entire *talook* for sale, must be determined by the Regulations, which should be construed liberally towards the defaulter. This estate is assessed, under the decennial settlement, in seventy-four separate lots and portions, and a sale in any other form was clearly illegal. There is no Regulation in existence which imposes upon the *malguzar* who has more than one village, a legal obligation to comprise them in one lot, or to consolidate the separate assessments of the several villages. Accordingly, the prac-

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tice has been to sell the districts separately, taking so much as was necessary to satisfy the arrear, and no more. By sec. 13, Reg. XIV. 1793, it is ordered, that a portion of the estate of the defaulter should be sold in proportion to the arrears. Sec. 2, of Reg. V. 1796, declares, that the Collector should, with the utmost care, select such a portion of the lands as would be sufficient to satisfy the Government demands, and not more. Sec. 23, Reg. VII. 1799, also enacts, that the Collectors should be careful in selecting lands for sale in the most proper manner. Sec. 2, Reg. V. 1796, was found inconvenient, and was amended by sec. 6, Reg. I. 1801, by which, power was given to the Board, that when, compared with the value of the entire lands, the amount of arrear was such, that a small excess only could arise, in that case they were at liberty to sell the whole estate according to the Regulations. If the Collector had selected one village of these 74, it would have realised sufficient to have paid off the arrear, and have discharged the *Ranee* from her obligations to the Government. So extravagant an arrangement on the part of the Collector, who acted without competent authority, was unjust, and most oppressive to the *Ranee*. The spirit of the *Bengal Revenue Regulations* require, where there are separate assessments upon definite portions or districts of land, that the property should be put up for sale in separate lots. Sec. 3, Reg. V. 1796, expressly enacts, that distinct *mahals* separately assessed for the public revenue are to be sold in distinct lots. In *Meer Sheer Ali v. Sheikh Lootf Ali* (a), lands separately assessed were sold in one lot for arrears: the sale was set aside as illegal.

(a) 3 Mac. Sud. Dew. Rep. 63.

Again, in *Burmdeonarain Singh v. Hurshunkernarain Singh* (a), a public sale was annulled, on the ground that the villages were assessed, at the decennial settlement, as distinct *mahals*, in the names of different persons, and though they subsequently belonged to one and the same individual, yet it was held that they could not be sold to realize balances of Government as a single estate. These cases distinctly show the principle upon which the Courts in *Bengal* act with reference to the sale of property separately assessed. The sale of the entire *talook* was in violation of the spirit and letter of the Regulations then in force in *Bengal*.

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—II. But the sale was irregular, as well in its actual conduct, as in the preliminary proceedings. The first advertisement issued in this case was not such as was required by cl. 2, sec. 29, of Reg. VII. 1799, and sec. 9, of Reg. I. 1801. The object of the advertisement was to invite purchasers to attend the sale; but if the information given was altogether erroneous, the advertisement was illegal for want of compliance with the Regulations. There was no description in the advertisement or sale statement corresponding with what is required by the Regulations. It was altogether erroneous; it should have stated in detail every one of the *aslee* and *dakhilee* villages, to enable the bidders to understand that though it was described as 74 villages, yet it was in reality much more. Reg. VII. 1799, sec. 29, cl. 2. This is a fatal objection to the first advertisement. With respect to the second advertisement, that, we submit, must follow the fate of the first. It never was issued or pub-

(a) 4 Mac. Sud. Dew. Rep. 348.

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lished on the lands of the defaulter, as required by sec. 5, Reg. XXVI. 1803. This, of itself, is sufficient to annul the sale. *Bhugwunt Sing v. The Collector of Goruckpore* (a); *The Collector of Bareilly v. Major Hearsey*. (b). The provisions of Reg. XI. 1822, so far as they affect the rights of the parties to this Appeal, are not retrospective, and do not apply.

III. The remaining point is the appropriation by the *Ranee*, of the surplus purchase-money. The artificial principles enforced by Courts of Equity in *England* do not extend to *India*. Even if they did, it must be shown that the party who adopts an act does so with deliberation, and is aware of the effects flowing from it; before it can be construed into an admission, it must be proved to have been done deliberately. It must be done with intention, or that intention must be a necessary and unavoidable inference of law. There is no evidence, or even a pretence, that the *Ranee* made any written application for the purchase-money. The *mokhtar*, or general agent of the *Ranee*, taking the purchase-money, and appropriating it to the payment of the subsequent arrears, was an unauthorised act. It was not within the general scope of his authority. The *Ranee* was a woman utterly helpless in the *Hindoo* state of society, unable to attend to her own affairs. It cannot be contended that, so long as the *Ranee* continued in possession of the estate, in opposition to the purchaser, she was acquiescing in the purchase. The Appellants' counsel, throughout their argument, treat the *Ranee* as the vendor; we deny she can be so considered—the Government was the vendor. There

(a) 3 Mac. Sud. Dew. Rep. 325.

(b) 3 Mac. Sud. Dew. Rep. 242.

was no privity between the *Ranee* and the purchaser, and, therefore, the purchaser cannot have a right against her. If the Government had no power to sell the entire estate, the purchaser has no title. He must look to the Government. The remaining objection to the decree is for not directing an account or restitution of the purchase-money. There is no form of action analogous to a bill of account in the *Mofussil* Courts. It was a very just inference, after the Appellants had been sixteen years in possession, with such a beneficial purchase, to presume that they had indemnified themselves.

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Mr. Justice ERSKINE:

This appeal arises out of a suit originally instituted in the Provincial Court at *Patna*, in *December* 1817, by the late *Ranee*, the widow of *Rajah Juswunt Sing*, against the Government of *Bengal*; and also *Maha-rajah Mitterjeet Sing* (for himself and as Guardian of *Rajah Mood Narain Sing*), *Meer Abd-Oollah*, *Gokul Chund*, and *Baboo Byjnath Sahoo*, for the purpose of annulling the sale of the *talook* of *Belkhuruh*, in the *pergunna* of *Urol*, formerly the property of the *Ranee*, but which had been seized for arrears of revenue by the officers of the Government, and by them sold to the Appellant, *Maha-rajah Mitterjeet Sing*, for the sum of S. R. 110,000.

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The grounds upon which the sale was impeached by the *Ranee*, were in substance, as collected from her plaint, that the sale was the result of a fraudulent conspiracy between the purchaser, *Maha-rajah Mitterjeet Sing*, and *Baboo Byjnath Sahoo*, the cash-keeper of the Government, and *Meer Abd-Oollah*, and also the

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officers of the Collector; that a larger extent of property than was necessary to produce the arrears due, was put up for sale, and sold; and that for the purpose of enabling the purchaser to obtain the *Ranee's* property at an inadequate price, the whole of the *talook* of *Belkhuruh* had been unnecessarily and improperly put up to sale in one lot, and that the advertisement did not sufficiently apprise those who might be expected to become bidders at the sale, what was the extent and nature of the property to be sold; that the sale having been postponed, no sufficient advertisement of the day fixed for the sale had been published according to the Government Regulations; and that by these means, property of the *Ranee*, which was worth five *lacs* of *rupees*, had been purchased by the Appellant, *Maha-rajah Mitterjeet Sing*, for the inadequate price of S. R. 110,000. The *Ranee* further complained that the purchase was made in fictitious names, and that in reality it was a purchase for the use of the Government officers, contrary to the Regulations, and that the sale was in fact of 210 villages, whereas the advertisement stated it to be of 74 villages only; and further, that the balance of arrears was incorrectly stated; that in truth no balance was due for any arrears of the *talook* that was sold, and that no notice of the advertisement had been given to the *Ranee*.

After filing her plaint, and before any further proceedings were had, the *Ranee* died, and the suit was afterwards carried on by her heirs.

The Officers of the Government put in no answer to the Plaintiff's complaint.

After instituting certain inquiries into the circumstances of the sale, the Board of Revenue appears to

have come to the conclusion that the sale had been irregularly conducted, and to have wished that the purchaser should give up the estate to the *Ranee*; but the purchaser having declined to acquiesce in their view of the case, the Government took no part in the defence.

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The other Defendants, however, having put in their answers, and the pleadings having been brought to a close, a mass of evidence, both documentary and oral, was produced on both sides, and on the 19th of November 1825, the Provincial Court of *Patna* pronounced its decree, and thereby, after entering into an elaborate detail of all the circumstances of the case, and after stating that the sale was fictitious, and contrary to the Regulations, and was made through the collusion and misrepresentations of the officers of the Collector, and after further pointing out certain irregularities in the conduct of the sale, and the issue of the advertisements, ordered the sale to be annulled; and that the heirs of the *Ranee* should obtain possession of the villages in dispute, and that they should pay into the treasury the sum of R. 2,716. 6. 5., the balance after the receipt of R. 10,026. 4., on account of the balance of *malguzary* due to the end of *Phagoon*, with interest. The decree then proceeds thus:—
“And as it is probable that the purchasers have realized more than the price of the sale, with interest, from the profits of the villages in dispute, it is not thought necessary to give any order to return the sale price in this case; either of the parties who may think there is an excess of money due, may sue to realize it. As the sale was effected by the combination and misrepresentations of the officers and purchasers; and the Council (meaning the Provincial Council of

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Patna), upon the report of the Collector and the letter of the Board, when an answer of Government to the plaint was required, considered the sale improper, and advised the *talook* to be returned, (with which the purchaser would not comply, and on which account Government refused giving an answer to the plaint of the late *Ranee*), no blame is attached to Government. The whole costs of both parties are therefore to be paid by the purchasers.”

The purchasers appealed from this decree to the *Sudder Dewanny Adawlut*, and further evidence on both sides was taken in the cause by order of that Court, and on the 29th of *May* 1832, the Court pronounced its decree, affirming the sentence of the Provincial Court, upon the ground that the sale in dispute was unnecessary and improper, and contrary to the Regulations; and after giving its reasons for this conclusion, the Court proceeds to state as follows:—
 “But be it understood that the sale in dispute has not been reversed on account of the sale price of the lands much exceeding the *malguzary* due by the proprietor; for, according to sec. 25, Reg. V. 1812, it would not be a sufficient ground to reverse the sale. But be it known that the real ground for the reversal of the sale of the *talook* in dispute is, that although the *jumma* of every *mahal* of the *talook* was separately entered in the settlement of 1197 *Fusly*, the Collector did not refer to the Board for a sale of a portion of the lands of the defaulter sufficient to discharge the arrears due to Government; and it is still more wonderful that in the advertisement for the sale of the entire *talook*, the name and *jumma* of each *mahal* belonging to it was not mentioned, as ordered by the Regulations, and in consequence of which

omission a great loss has been sustained by the Respondents." It was, therefore, ordered that the decision of the Provincial Court should be in every respect affirmed, and all the costs be payable by the Appellant, and the Respondents be put in possession immediately, on paying S. R. 2,716. 6. 5., the balance due to Government, with interest from the date of sale.

Against these decrees the purchasers appealed to the Queen in Council, and Her Majesty having been pleased to refer the case for hearing before the Judicial Committee, it was fully and ably argued here, on the 7th, 11th and 17th of *December* last.

And upon the argument the learned Counsel for the Respondent, feeling that the facts proved in the Court below would not enable them to support the decrees appealed from, on the ground either of fraudulent combination between the purchasers and the Collector, or upon their plea that the sale was fictitious, or that the purchase was made on behalf of the Government officers, very properly abandoned those untenable positions; for their Lordships are satisfied, after a careful examination of the evidence, that no such case was made out by the Respondents. But it was upon the argument, strongly urged, that the sale had been justly annulled on the ground that the sale of the whole *talook*, and especially the sale of it in one lot, was unnecessary and improper, and contrary to the Regulations, and without the sanction of the Board of Revenue, and that the advertisements were insufficient in point of form, and had not been properly issued or served.

A short summary of the facts proved will render clear the view which their Lordships take of the questions before them.

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It appears that the *talook* in question consisted of 210 *mouzas*, or villages, of which 85 were original or principal villages, called *aslee*, and 125 were dependent villages or hamlets, called *dakhilee*; but these 210 villages were classed for fiscal purposes under the names of 74 of the villages, and a separate sum, called the *sudder jumma*, was, by the settlement of 1197 *Fusly*, assessed upon each of these 74 fiscal villages, the total amount of which was S. R. 24,748. 11. 10. This constituted the *sudder jumma* of the whole *talook* of *Belkhuruh*. Besides this *talook* of *Belkhuruh*, the *Ranee* was also the proprietor of four other *talooks* in other *pergunnas*, the assessments for which were entered in the same form, namely, by placing a *sudder jumma* opposite the several fiscal villages of each *talook*, and placing the sum total of these *jummas* as the *sudder jumma* of the respective *talooks*, making the *sudder jumma* of all the five *talooks* to amount to R. 41,451. 4. 15., which was the amount of revenue payable yearly by the *Ranee*, in respect of these five *talooks*.

It appeared by the evidence, and by the admission of the parties, that prior to the year 1801, separate *kabooliats*, or leases, were made in respect of each of the fiscal villages composing the several *talooks* above mentioned.

But in the year 1801, in consequence of the inconvenience arising from such an arrangement, the different *zemindars* were required to furnish a general *kabooliat* and *kistbundy* for the whole of their villages, and it was notified to the different *zemindars* that the several adjoining villages composing a *zemindary*, or held by one individual, were to be considered as one joint estate, and that all the villages of a proprietor

would be included in the name of the principal village as one *talook*.

In pursuance of this requirement and notice, the *Ranee*, by her agent *Puhulwan Sing*, on the 24th of *October* 1801, executed a *kabooliat*, by which he undertook, on the behalf of the *Ranee*, to continue to pay the sum of R. 41,451. 4. 15., the *jumma khiraj*, or assessment of the *pergunnas* *Urol*, *Mussoora*, *Shahpoor Mittah*, *Sanda* and *Goh*, (that being the annual *jumma* fixed at the decennial settlement,) and declared that if she should not pay the instalments monthly, according to the deed of instalment, the whole of her property and possessions might be sold at the discretion of the chief authorities, and the balance realized. And in a schedule to this instrument the names of the 74 fiscal villages, with the several assessments to each, were inserted, headed by the name of the *pergunna Urol*, with the *sudder jumma* of such assessments, followed by a similar list of the other villages and assessments, arranged under similar headings of the names and *sudder jumma* of the other *pergunnas* to which they respectively belonged.

It further appeared by the evidence, that in the month of *February* 1815, there was an arrear of revenue due to Government from the *Ranee*, in respect of these five *talooks*, to the amount of S. R. 12,742. 10. 5., and that upon the 2nd of *May* 1815, the acting Collector at *Bahar* published an advertisement for the sale of *Belkhuruh*, on *Monday*, the 5th of *June*, at the Collector's *Sudder Cutcherry* at *Bankissor*, in which the property to be sold was described in the form there set forth.

Evidence was given of the service and distribution of this advertisement, the insufficiency of which, how-

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ever, formed one of the subjects of complaint by the *Ranee*, to which it will be necessary more particularly to refer.

It appears that the estates of other defaulters had been advertised for sale on the same 5th of *June*, but before that day arrived, orders were received by the Collector from the Board of Revenue, that, with a view of affording to the *malguzars* in arrear a further indulgence in respect of time, the sales should be deferred until the 22nd of that month.

No public notice of this postponement had been given before the 5th of *June*, and a number of persons having assembled on that day, expecting a sale, the acting Collector caused it to be made known to the persons present that the sale was postponed till the 22nd of *June*, and another advertisement was prepared and delivered for distribution in the form stated in the pleadings.

Notice of the postponement was publicly given to the several persons attending for the expected sale, amongst whom was *Chumun Lal*, the agent of the *Ranee*, who had herself applied for a postponement of the sale. A copy of this advertisement was affixed to the *cutcherry* at which the sale was to have taken place, and copies of the advertisement were affixed at the different Courts in the district, but no copy of this advertisement was served on the *Ranee* herself, or affixed upon any part of the estate.

On the 22nd of *June*, the *talook* of *Belkharuk* was put up for sale in one lot, and sold to the agent of *Mitterjeet Sing*, for the sum of S. R. 110,000, which sum was afterwards, before the 29th of *June*, paid into the Treasury. On the 29th of *June*, petitions were presented by *Mitterjeet Sing*, *Gokul Chund*, and *Meer*

Abd-Oollah, stating that the estate had been bought by *Mitterjeet Sing*, as to one half, for his son, *Baboo Mood Narain*; as to one fourth, for *Gokul Chand*; and as to the remaining one fourth, for *Meer Abd-Oollah*; and praying that their names might be inserted as proprietors, according to their several proportions. On the 4th and 6th of *July*, petitions were presented by the *Ranee*, complaining of the sale, and praying that it might be annulled, which were laid before the Board of Revenue, and that Board (after receiving a report from the acting Collector to whom the two petitions were referred for an explanation by a letter from their acting Secretary to the acting Collector of *Bahar*, dated the 15th of *August*) declared that the Board was satisfied with the explanation relative to the sale of the estates of the *Ranee* of *Rajah Juswunt Sing*, and considered the sale legal, and accordingly confirmed it. But owing to circumstances which it is not necessary to mention, possession was not given to the purchasers until the month of *March* 1816.

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It further appeared, by evidence satisfactory to their Lordships, though the fact has been disputed by the Respondents, that the balance of the purchase-money (after deducting the arrears of duty for which the sale was made, and the costs of the sale) was, from time to time, appropriated by the *Ranee* to the payment of arrears of tribute due from her, in respect of other property, and that at the time of the commencement of the suit now under Appeal, there remained the sum of R. 77. 9. 10. only, unappropriated, and that this small balance was afterwards applied by her to the like purposes.

Under these circumstances, it was contended, on the part of the Appellant, that the sale of the whole

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talook was strictly correct, according to the fair import of the Regulations then in force, and that the advertisements were issued and published agreeably to the form prescribed by the Regulations; that even if more than was necessary had been erroneously sold by the Collector, and if the form and publication of the advertisements had been defective, the sale could not be thereby invalidated; and that, at all events, neither the *Ranee* nor her heirs could now claim to have the sale annulled on such grounds, since the *Ranee* had, by appropriating the purchase-money, after it had been paid into the Treasury by the purchaser, adopted and ratified the sale, and waived all irregularities in the conduct of it; and that still less could any irregularities in the form or service of the advertisement supply any ground for annulling the sale, after such appropriation of the price.

The Respondent, on the other hand, insisted, that as the power of the Collector to sell, was a qualified power, the purchaser could only maintain his title under the sale by showing that the power had been duly exercised, and they denied that there was any sufficient evidence of any appropriation of the price by the *Ranee*, and asserted that if there was, it could not give efficacy to a sale, which was made in defiance of her protest and resistance, and contrary to law.

The first question, therefore, which their Lordships have had to consider is, whether the sale in one lot of the whole *talook*, for arrears of tribute which might have been paid off by the proceeds of some definite portion of the *talook*, was within the scope of the Collector's authority; for if the Collector had no authority to sell the whole *talook*, under the circumstances, as they stood at the time of the sale, their Lordships

assent to the argument of the Respondent's counsel, that no implied adoption of the sale by the subsequent appropriation of the price will bar the *Ranee* from reclaiming her estate on the restitution of the purchase-money.

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The power of the Collector to sell the *talook* depends upon the different Regulations referred to in the argument. The Regulation XIV. 1793, after requiring certain preliminary steps not relevant to this inquiry, declares, that the lands of defaulters are liable to seizure and sale by the Collector (without legal process in any court of justice), for the discharge of arrears of revenue, but only under the sanction of the Governor-General in Council, previously obtained upon the report of the Collector, and the recommendation of the Board of Revenue, who are to recommend the sale of such a portion of the estate of the defaulter as may be sufficient for the liquidation of the amount.

By Reg. III. 1794, sec. 5, the Collector is required to submit to the Board of Revenue a statement of such lands of the defaulter as he may think it advisable to have sold to make good the arrears, and the Board of Revenue is authorized to cause the lands specified in such statement, or any other lands belonging to the defaulter, to be advertised for sale, and to report the same, but still the sale is not to take place without the previous sanction of the Governor-General in Council.

By Regulation V. 1796, the Collector is directed to be careful to select for sale such lands as, from the current value of similar lands, may appear likely to sell for the amount to be recovered by the sale, and no more.

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Now, taking these Regulations together, they declare the power of the Governor in Council to sell the lands of any defaulter for the payment of the arrears of revenue, but they also declare that the Governor-General will only proceed upon the recommendation of the Board of Revenue, to whom the Collector is to report not only the arrears, but also the lands, which, in his judgment, ought to be sold for the liquidation. In forming that opinion, the Collector is required to be careful to select such lands as may appear likely to produce the amount of the arrears, and no more; and then, in order to protect the proprietor from the consequences of any miscalculation on the part of the Collector, the 3rd section of Regulation V. 1796 proceeds to direct that where the lands put up to sale consist of distinct *mahals*, separately assessed for the public revenue, they are to be sold in distinct lots, or though not separately assessed, if they be of considerable extent, and may be readily divided into distinct lots, they are to be divided and sold; and then provides that so many distinct lots only shall be sold as may be necessary to produce the amount of the arrears and costs. But where the lands are put up in one lot, the whole is to be sold, whether the amount bid for them be more or less than the sum due, and the overplus, if any, paid to the proprietor.

By Reg. VII. 1799, the sale of the land of defaulters is only to take place once a year, and in the interval the Collector is authorized to attach the lands of the defaulters; and at the close of the year, by the 5th clause of section 23, he is required to report to the Board of Revenue the amount of the arrears, and at the same time to transmit a statement of the lands for sale, sufficient to make good the arrears, and the interest

thereon to the time of the sale, to be disposed of according to the rules prescribed for public sales on account of arrears of revenue. By sec. 30, it is declared that the Board of Revenue are thereafter to conduct the sales of land in the mode prescribed by the Regulations, without any reference to the Governor-General in Council, except in cases where they require his instructions ; and they are required to be particularly attentive to the proper selection of lands for sale by the Collector.

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The effect of this alteration is worthy of attention; for as before this time no sale of any lands for the arrears of revenue could take place without the sanction of the Governor-General in Council, and as the Governor-General in Council claimed and exercised an indefeasible right to sell the whole or any portion of a defaulter's lands for arrears of revenue, it followed that no sale of land for such purpose, under the sanction of the Governor-General in Council, could be invalidated on the plea that too much had been selected by the Collector.

But as, by the Regulation last referred to, the Board of Revenue are authorized to conduct the sales in the mode prescribed by the Regulations, without reference to the Governor-General, it would follow that the sale in question, which was made without any reference to the Governor-General in Council, could only be sustained under this Regulation, by showing that it was sanctioned by those former Regulations.

By Reg. I. 1801, sec. 6, after reciting that the unqualified operation of the rule established by sec. 11, Reg. V. 1796, had been found prejudicial to the public interests, in the subdivision of small estates, as well as to the proprietors of such estates, by par-

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selling them into lots so inconsiderable as to prevent a competition for the purchase of them, and after authorizing the Board of Revenue, if they should judge it advisable, to sell in one lot any entire estate of which the annual assessment did not exceed S. R. 500, the Board of Revenue is thereby authorized, whenever the amount to be recovered by a sale of land shall bear such proportion to the computed value of the whole estate as may be calculated to leave only an inconsiderable surplus on the sale of the entire estate, to sell the entire estate in the manner prescribed by the Regulations, though the total annual assessment should exceed the sum of S. R. 500 above limited. In such cases, the value of the lands for sale is to be computed from the best information procurable, of their produce and extent, compared with the amount of the assessment upon them, and the current value of similar lands. And by sect. 7, it is provided that the rule in sec. 3, Reg. V., 1796, is not meant to require the division and distinct allotment of a *pergunna* or *tur-ruf*, or other established local division; that, on the contrary, all established local divisions of known limits are, as far as possible, to be preserved entire in every possible sale of land, and to regulate, in general, the subdivision of landed property, when an estate may be divided at the public sales, and a portion disposed of as a distinct estate.

If the authority vested in the Board of Revenue had stopped here, it would have been necessary to show, not only that the sale of the whole *talook* of *Belkharuh* had been made by the directions of the Board of Revenue, but also that such sale was authorized by the terms of the 6th & 7th sections of Reg. I. 1801, last referred to.

But by Reg. V. 1812, sec. 27, it is declared that the consideration of, and decision on, the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it, resides in the Board of Revenue and Board of Commissioners respectively, subject to the control of the Government.

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And by sec. 25, after reciting that no means existed by which any certain or accurate computation could be formed *à priori* of the real value of any estate, or portion of estate, it was declared that sales made at public auction, for that purpose, were not liable to be annulled by the Courts of Judicature on the ground that the proceeds of the sales had materially exceeded the amount of the arrears due from the proprietor of the land to Government, and that the Board of Revenue and Commissioners would be guided by their own discretion,—subject, of course, to any instruction from the Governor-General in Council.

By Reg. XVIII. 1814, sec. 2, it was enacted, that whenever any portion of an instalment of revenue payable in any month, remained undischarged on the 1st of the following month, the Collector might forthwith, or at any subsequent time (that arrear remaining undischarged), either after service of a written demand, or without such demand, advertise lands, the property of the defaulter, for public sale, without first submitting a statement of those lands for the previous sanction of the Board of Revenue, or Board of Commissioners, supposing the lands so advertised to constitute an entire estate, or the whole of the defaulter's right and interest in a joint estate; but in such case he was to report the same to the Board of Revenue or Board of Commissioners, and to await the Board's sanction, and

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on no account to proceed to the actual sale of the lands without the express sanction of the Board, subject to a proviso for apportioning the *jumma*, in cases in which the lot proposed to be sold constituted only a part of the defaulter's property in an estate. By sec. 4, the Board of Revenue are directed, on receipt of the Collector's report of his having advertised lands for sale, or on receipt of any statement of land proposed by him for sale, to proceed without reference to the Governor-General in Council, to determine whether the sale shall take place.

This was the last Regulation passed upon the subject before the date of the sale in question; at that time, therefore, the law stood thus:—The discretionary power of deciding whether the whole of defaulters' lands, or any, and what portion of them, should be actually sold to pay the arrears of revenue, which was originally vested in the Governor-General in Council, was transferred to the Board of Revenue and Commissioners, subject, nevertheless, to the control of the Governor-General in Council, whenever he thought fit to interpose in his executive capacity. But in order to assist the Board in this decision, and to prevent delay, it was the duty of the Collector, whenever any revenue fell in arrear, to report the amount of it to the Board of Revenue, or Board of Commissioners, and, either before or after advertising a sale, to send a statement of the particular land of the defaulter which he proposed should be sold to pay off the arrears; but the Collector was, in no case, to proceed to an actual sale without the express sanction of the Board.

The fact to be ascertained, therefore, with respect to the first question, is, whether the Board of Revenue

had, before the disputed sale, sanctioned the sale of the whole *talook* of *Belkhuruh* for the liquidation of the arrears due from the *Ranee*.

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Now it appears from the evidence, that on the 24th of *April* 1815, the Collector reported to the Board of Revenue that he had advertised certain lands for sale on the 5th of *June* then next, and transmitted an abstract statement of the lands in *zillah Bahar*, proposed to be sold for the recovery of arrears of revenue due to Government up to the 1st of *Phagoon* 1222 *Fusly*, that is, to *February* and *March* 1815. He also states that he transmits statement in Persian, together with the abstract in English; but it nowhere appears what the statement in Persian contained. And although the Collector, in this letter, states he had advertised for sale the lands mentioned in the abstract, there is no evidence in the proceedings of any advertisement of any land of the *Ranee* having been published before the 2nd of *May* following, at which date the advertisement already referred to was published. Although this advertisement specifies in the margin that seventy-four *mouzas* were to be sold for the payment of the balance due to Government, of S. R. 12,742. 10. 3., and states that the sale was to take place in conformity with the order of the Board of Revenue, yet there are no traces in the evidence of any previous notice having been forwarded to the Board of Revenue of the specific lot that it is proposed to put up for sale, and the abstract contained in the Collector's letter of the 24th of *April* gives no such information to the Board; neither, indeed, do the Regulations require that such notice should be sent previous to the advertisement; and, as the date of the orders of the Board of Revenue is not stated in the advertisement, there is no reason

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for concluding that any such authority had at that time been given for the sale of any specific lands for realizing the arrears due from the *Ranee*; and there is no evidence of any communication to the Board of Revenue of the intention of the Collector to sell the *talook* of *Belkharuh* in one lot for that purpose. There is no direct proof, indeed, that the advertisement was ever forwarded to the Board before the sale, and if it had been, without further explanation, it would not have apprized the Board that the 74 *mouzas* proposed to be sold constituted the whole of the *talook*, or that the sale of any definite portion would be sufficient to cover the amount of the arrears. Neither is there any trace in the evidence, that the Board of Revenue, at any time before the sale, had actually given authority to the Collector to proceed to the sale of the seventy-four *mouzas* in one lot.

It may be, indeed, fairly assumed that the Board had been informed that the Collector had advertised for sale the number of *mouzas* mentioned in the abstract of the 24th of *April* 1815, and that the sale of those *mouzas* generally had been sanctioned by the Board, because it is stated that the sale of those estates had been postponed from the 5th of *June* to the 22nd of *July*, by the order of the Board, a statement sufficiently sanctioned by the subsequent confirmation of the sale; but there is not only no direct proof of any specific authority from the Board of Revenue to sell the whole *talook* in one lot,—there is not even a statement by the Collector that any such authority had been given; on the contrary, the statement by the Collector leads to the inference that none such had been received by him; for in his report in answer to the *Ranee's* complaint, that the whole *talook* had been

sold in one lot, he does not plead the specific authority of the Board, but the known general principles of the Regulations, as his justification for having so conducted the sale; a justification amply sufficient, if true, for it is only when the general directions of the Regulations are departed from, that the specific directions of the Board can be required.

But, as has been already shown by Reg. XVIII. 1814, sec. 2, the Collector is expressly forbidden to proceed to the actual sale of lands advertised, without the express sanction of the Board to whom, by the previous Regulation of 1812, was entrusted the consideration of, and the decision on, the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it. And even by the earlier Regulations of 1796, when the Collector, as it should seem, conducted the sale upon general rules laid down by the Governor-General in Council, without any specific directions on any particular sale that fell within the scope of the general rules, he was bound to select for sale such lands as, from the current value of similar lands, might appear likely to sell for the amount to be recovered by the sale, and no more. And the spirit and tone of the whole code of Regulations require that where there are separate assessments upon definite portions or divisions of the property, the property should be put up to sale in separate lots, unless it should be the wish of the proprietor, or for his obvious benefit, that the whole estate should be put up in one entire lot, in which case the whole was to be sold, and the surplus paid over to him. A reference to the Regulations, therefore, shows that the plea urged by the Collector was unfounded, while the adoption of that plea argues that

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Other Regulations were passed after the date of the sale, some of which have a retrospective operation, but none of them directly affect the question now under consideration, although one of them tends to confirm the view which has been already taken of the effect of former Regulations. The provision alluded to is in the 3rd cl. sec. 6, of Reg. XI. 1822, by which it is declared that no sale, whether made before or after the promulgation of that Regulation, shall be liable to be annulled on the grounds of informality or omission in the communications that may have passed between the Collector and Controlling Board; provided that the Board shall have actually given authority to proceed to the sale of the specific lot sold. Now for the reasons already given, this clause will not protect the sale in question, and its terms seem to imply that previous authority by the Board to proceed to the sale of the specific lot sold, was essential to the validity of all sales by the Collector.

In the course of the argument, reliance was placed upon the *kabooliat* executed by the *Ranee's* agent, by which she subjected the whole of her property and possessions to sale for any arrears that might be due. But this *kabooliat*, which was executed on the 24th of *October* 1801, was given at a time when, by the Regulations, the Board of Revenue itself had only a limited power in the sale of an entire estate; and this *kabooliat* purports at the most to give a more extended power to the *Board*, for the words "chief authorities," could not be fairly taken to vest any discretion in the Collector. But as at the date of the

sale, the Board of Revenue had, as we have seen, legislative authority for the exercise of an unlimited discretion, no additional sanction could be acquired for the Board from this *kabooliat*, and none is given by it to the Collector.

From the whole evidence in the case, therefore, their Lordships are of opinion that the sale by the Collector, of the whole *talook*, was an act unauthorized either by the general rules and principles of the Regulations, or by any specific authority previously conferred by the Board of Revenue. It remains, therefore, to be seen what effect ought to be given to the subsequent confirmation of the sale by the Board, and the supposed adoption of it by the *Ranee*.

In considering the effect of the subsequent confirmation of the sale by the Board, it must be remembered that the Board had not the supreme, but only a delegated authority, and that by the terms in which that authority was conferred, they were expressly required to exercise their discretion before the sale took place, and that there is no power conferred on them to adopt and confirm an unauthorized sale by the Collector. As their Lordships therefore are of opinion that the sale was illegal and void in the months of *June* and *July*, so they think it was not rendered valid by the unauthorized confirmation of it by the Board of Revenue, in the month of *August*. This would clearly be the case in respect of any sale since the promulgation of Reg. XI. 1822, by the express provision of sec. 25 ; but as that section is not retrospective, no authority can be derived from it in this case ; but the principle which dictated the Regulation will supply the rule without it. And although their Lordships would have been prepared to hold that

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all mere irregularities in the improper and unnecessary sale of the whole *talook* in one lot, in the form of the advertisements and the manner of their service, had been sufficiently waived by the *Ranee* when she appropriated the surplus purchase-money to her own purposes, so as to deprive her of all claim to annul the sale on the ground of such irregularities, yet their Lordships cannot consider the *Ranee's* acquiescence in a sale made, as she had every reason to believe, by the authority of the Board of Revenue—as giving legal efficacy to a sale altogether void for the want of such authority. It is true that this case is also provided for by Reg. XI. 1822, sec. 27 ; but this Regulation does not in terms refer to cases of money received before the promulgation of that rule, and in justice ought not to be so extended ; and though as a positive Regulation it may be considered as an useful amendment of the law, there is no known general principle upon which such a rule could be held to exist independently of express enactment.

Their Lordships, therefore, feel themselves constrained to uphold the judgment of the Courts below, so far as they annul the sale of the *talook*.

But their Lordships cannot approve of the manner in which those Courts have disposed of the pecuniary questions between the parties, either as to the purchase-money or the costs. In the view that their Lordships have taken of the case, the Appellant, the *Maha-rajah*, stands wholly free from blame. He purchased the *talook* at a public auction, which to all appearances was regularly held under the sanction of the proper authorities. He paid the purchase-money into the treasury, and after some delay got possession of the estate. The purchase-money was appropriated in part

to the payment of the arrears due from the *Ranee*, in respect of that estate ; and as to the residue, applied by the *Ranee* herself to the payment of other arrears due from her upon other accounts. The Court below, without entering into any investigation of the profits made by the Appellant during his occupation of the estate, has assumed that he had reimbursed himself the amount of the purchase-money, and interest, out of the profits of the estate.

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Their Lordships see no ground upon which the Court could found such an assumption. According to the *Ranee's* account, the *talook* for some years before the sale had not enabled her to pay the revenue ; and there are no facts stated to show that it had been more productive in the hands of the Appellant.

Their Lordships, therefore, are of opinion that an account should be taken of the principal and interest due to the Appellant in respect of the purchase-money paid by him into the treasury, and also of the net profits made by him out of the estate during his occupation, making all just and reasonable allowances for permanent improvements made by him ; and that upon payment to him by the Respondent of whatever (if anything) may appear to be due to him on taking such account, possession of the *talook* should be delivered to the Respondents. And as in their Lordships' view of the case, the Appellant, the *Maha-rajah*, stands acquitted of all blame in the transaction, their Lordships think that so much of the decree of both the Courts below as condemns the Appellants in costs, should be reversed, and that each party should bear their own costs, both in the Courts abroad and in this country, and they will advise Her Majesty accordingly.

MAHA-RAJAH ISHUREE PERSAD NA-
RAIN SING and BABOO DEEP NARAIN
SING, - - - - - } *Appellants,*

AND

LAL CHUTTERPUT SING - - *Respondent.**

On Appeal from Bengal.

Bengal Revenue sale Regulation I of 1821—Setting aside of sale—Long delay in taking steps—Effect of—Sale by direction of Govt.—No fraud on the part of purchaser—Compensation to purchaser—Award of.

A sale in 1802 of lands in *Allahabad*, for arrears of Government revenue, set aside by the *Mofussil* and *Sudder* Commissions, constituted under Reg. I. of 1821, although no suit brought to annul the sale until the year 1821. Affirmed on appeal by the Judicial Committee.

But the sale having taken place by the direction of the Government, and there being no fraud on the part of the purchaser, the Judicial Committee, under clause 2, sec. 4, of Reg. I. of 1821, awarded the purchaser compensation, to be paid by the Government.

THIS was an Appeal from a decree bearing date the 24th of *February* 1829, pronounced by the *Sudder* Special Commission, appointed under Reg. I. of 1821,† for the ceded and conquered provinces under the Presidency of *Bengal*. By this decree, so much of the previous decree of the 31st of *August* 1826, of the *Mofussil* Special Commission, constituted under the provisions of the same Regulation, as annulled a sale by auction of *pergunna Barah*, in the *zillah Allahabad*, for arrears of revenue, and decreed the restitution thereof to the Respondent, was affirmed; but so much of that decree as directed compensation out of the Government treasury in favour of the Appellant, the *Maha-rajah*, was reversed. The sale took place under these circumstances :—

* Present: Members of the *Judicial Committee*,—The Lord President (Lord Wharncliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and The Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

† Abolished by cl. 1, sec. 10, Reg. I. 1829.

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In the year 1207 *Fusly* (A.D. 1799-1800), the *zillah* of *Allahabad* formed part of the dominions of the *Nawab Vizier* of *Oude*, and *Lal Juggut Raj*, the father of the Respondent, was at that time the *zemindary* lessee of the *pergunna Aræ*, and hereditary *zemindar* of the *pergunna Barah*, which were jointly assessed at the sum of R. 320,000. In 1801, a new assessment was made by the *Nazim* (or chief officer) of the *Nawab Vizier*, *Roy Madary Lal*, whereby an increase of R. 10,000 was added, and the *jumma* of the *pergunna* fixed for two years certain at R. 330,000 ; and, notwithstanding this arrangement, and an agreement, signed by both parties, a further assessment was made in the same year, and *Lal Juggut Raj* was compelled by force and intimidation, to execute another deed or engagement, binding himself to pay an annual *jumma* of R. 346,000 in the two following years, instead of R. 330,000, as previously assessed and agreed.

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In the year 1801, A.D., the *Nawab Vizier* ceded the *zillah* of *Allahabad* to the East India Company, and Mr. *Ahmuty* was appointed by the British authorities Collector of the *zillah*.

The Collector, on entering on his office, issued notices, calling upon the *zemindars* to render an account of the Government dues. In obedience to this summons, *Lal Juggut Raj* attended at the Collector's office, when an arrear of R. 41,134. 15a. 3g. appeared due from him to *Roy Madary Lal*, under the agreement so obtained from him.

The arrears continuing unliquidated, Mr. *Ahmuty*, with the sanction of the Lieutenant-Governor and Board of Commissioners, on the 30th of *October* 1802, caused the *zemindary* of *pergunna Barah* to be put up for sale by public auction, with a view of realizing the arrears,

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when the *pergunna* was purchased for R. 93,000 by *Baboo Outtroo Sing*, the *Naib*, or agent, of *Maha-rajah Oudit Narain Sing*, the then *Rajah* of *Benares*, in the name of the *Rajah's* brother, *Baboo Deep Narain Sing*, one of the Appellants, who was shortly afterwards put in possession, and to whom a deed of sale was regularly made in *November* in the following year.

In the year 1808, *Lal Chutterput Sing*, the son of *Lal Juggut Raj*, presented a petition to the Board of Commissioners, alleging that, instead of his having been in arrear when the sale took place, a balance was due to him ; and that the sale was brought about through the contrivance and enmity of the Collector, and was purchased by the *Rajah* in the name of his brother, through fraud and connivance, and praying that he might be restored to his inheritance.

The Board forwarded the petition with its inclosure to the Governor-General in Council, and after stating the result of their examination of the case, concluded their report with the following paragraph :—

“It is too late to regret that the first measure of the British Government, on the introduction of its authority into the province of *Allahabad*, should have been the sale of one of the largest of the zemindaries in it, and the extirpation of an old and respectable family, and at this distance of time the interposition of Government may probably be no longer of any avail. After a lapse of six years, it must be scarcely possible to revise the collections of the successive *Sazawals* deputed by the Collector, or to revert to the different persons on whom the Collector had engaged to enforce *Juggut Raj's* claim ; and from the retirement of the public officer, through whose concealment of some, and misrepresentation of other material facts, the sale

was ordered, all redress seems to be precluded. At the same time, therefore, that we submit the case to Government as one of peculiar hardship, we confess ourselves at a loss to frame any specific proposition in regard to it. Should, however, every other redress be impracticable, your Lordships may possibly consider *Juggut Raj*, under all the circumstances, entitled to some provision from Government."

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In consequence of this report and recommendation, the Governor-General, on the 1st of *September* 1809, granted an annuity of R. 5,000 to *Lal Juggut Raj*.

On the 12th of *September* 1820, the Respondent, *Lal Chutterput Sing*, the son of *Lal Juggut Raj*, filed a plaint in the Provincial Court of *Benares* against the Collector of *Allahabad* and *Baboo Deep Narain Sing*, to set aside the sale of his hereditary *zemindary*, as invalid and illegal. The Plaintiff set forth the circumstances under which *Juggut Raj* had been compelled to submit to the oppressive assessment of his *pergunna* under the *Nawab Vizier's* government, and the subsequent adoption of that assessment by the British government, the inability of *Juggut Raj* to pay the same in full, the arrears, and the consequent sale of the *pergunna Barah*, which the Plaintiff alleged had been illegally and unjustly sold for arrears not legally due, at an inadequate price, the approval of which was obtained through misrepresentation and falsehood, and the sale effected by collusion and fraud. He stated himself to have been an infant at the time of the sale, that the property was hereditary property, and prayed that the sale might, under the circumstances, be declared void, and the estate restored. The Defendants answered the plaint, but no further proceedings were had in the Court of *Benares*, in consequence of the

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establishment of the *Mofussil* Special Commission, under Reg. I. of 1821.

This Regulation was passed by the Governor-General in Council, on the 13th of *January* 1821, “for the appointment of a Special Commission in the ceded and conquered provinces, for the investigation and decision of certain claims to recover possession of land illegally or wrongfully disposed of by public sale, or lost through private transfers, effected by undue influence; and for the correction of errors or omissions of the proceedings adopted by the revenue officers, in regard to the record and recognition of proprietary rights, and the assessment of the tenures, interests, and privileges of the agricultural community.” The preamble stated, that “It had appeared that, in the first seven or eight years after the acquisition of the ceded provinces by the British Government, the native officers of Government, their relations, connexions, and dependents, taking advantage of the novelty of the British rule, of the weakness and ignorance of the people, and (in some cases) of the culpable supineness and misconduct of the European functionaries, under whose authority they were employed, contrived, by fraudulent and iniquitous practices, to acquire very extensive estates in several of the provinces in question, more especially in the district of *Allahabad*, *Cawnpoor*, and *Goruckpoor*, thus wrongfully depriving of their just rights a great number of the ancient landowners, and reducing them and their numerous dependents to ruin and misery. That these abuses had been chiefly practised through the perversion, to the purposes of chicanery and fraud, of the rules enacted for the collection of the Government revenue, more especially the provisions relating to the

public sale of land for arrears. Under cover of these rules, but contrary to the true intent and meaning of the law by which (though a considerable discretion was left to the Revenue authorities) the measure of a public sale was principally designed for cases of embezzlement, contumacy, or fraud, many estates were sold, from which no balance, or a very trifling balance, was due, or on which the arrear accrued without any embezzlement or wilful default on the part of the *Sudder malguzar*, and others were disposed of without an observance of the prescribed forms." It then recited, that "the existing Regulations did not vest the Civil Courts with so extensive a discretion in the adjustment of a doubtful claim, and in the relief of parties suffering hardships, as the cases in question appeared to demand;" and that "proceedings of the established Courts must necessarily partake of any defects belonging to the law which it is their duty to administer, and it would be obviously inconsistent with every sound principle, to grant a general discretion to those Courts to deviate from the law on individual views of expediency or justice;" and, "in consideration of the above circumstances, it had appeared to the Governor-General in Council to be essentially necessary to the ends of justice, that a Special Commission, with large discretionary powers, and with full authority to regulate its proceedings according to the exigencies of the cases brought before it, should be constituted, for the purpose of investigating the cases above described; of restoring to their just rights the *zemindars*, and other proprietors, who have been wrongfully dispossessed; of defining and fixing the real nature and extent of the interests and title conveyed to the purchasers in cases in which sales may be

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upheld ; of restoring proprietors whose estates may, in consequence of the errors in the administration above noticed, have been transferred to another, on account of a trifling balance, or for a trifling consideration, making due compensation to the present possessors; of granting redress to persons who have lost the possession or management of their estates without just cause, under the operation of a public sale, or through any act of a revenue officer, or who may have been wrongfully excluded from engagements with Government; and of making an equitable adjustment of doubtful claims, including the relinquishment, upon due compensation, of rights acquired or held under the strict operation of the law, by means inconsistent with equity and justice, or involving excessive hardship to the sufferers.”

It was therefore enacted, that a Special Commission should be constituted, for the purposes described in the preamble, to be called the “*Mofussil* Special Commission, acting under the provisions of Reg. I. of 1821.” A second Commission, denominated the “*Sudder* Special Commission, acting under the provisions of Reg. I. of 1821,” was also to be constituted, to superintend the proceedings, and, where necessary, to review the decisions of the *Mofussil* Commission.

The jurisdiction and duties of these Commissions were prescribed at much length, both in the Regulation itself, and also in certain resolutions of the Government, promulgated at the same time; and the Regulation of 1821 was subsequently amended and enlarged by Reg. I. of 1823.

The Governor-General in Council carried into effect this Regulation, by the appointment of the members of the two commissions, the issuing of directions for their

proceedings, and the declaration of the limits within which their jurisdiction should extend.

The Respondent then brought the subject matter of the present cause before the *Mofussil* Special Commission, and filed his plaint against the Government, *Rajah Oodit Narain Sing*, and the Appellant, *Baboo Deep Narain Sing*; whereupon an order was directed to the Provincial Court of *Benares*, to transfer the record of their proceedings in that Court to the Commission.

Rajah Oodit Narain Sing and the Appellant, *Baboo Deep Narain Sing*, put in their answers to the plaint before the Commission, but no answer was filed on the part of the Government.

A variety of evidence, consisting of documents, accounts, reports, letters, and proceedings relating to the property, were adduced as evidence by the parties in the cause, and called for by the Court from the public offices, the examination of which was not concluded until the 31st of *August* 1826, when the Court pronounced its decree, whereby it was—

“ Ordered, that the sale of the *pergunna Barah* be
 “ cancelled, and its restoration decreed to *Lal Juggut*
 “ *Raj*, father of the Plaintiff, without prejudice to
 “ the rights and interests of other claimants, should
 “ there be any; that, as specified above, the sum of
 “ R. 66,541. 9a. 6g. from the Government Treasury
 “ (in the event of its disbursement being sanctioned by
 “ Government), and R. 26,458. 6. 6. from the Plaintiff,
 “ such sums of R. 66,541. 9. 6. and R. 26,458. 6. 6.
 “ making together R. 93,000, be paid to the present
 “ occupant; that each party pay his own costs; that
 “ a copy of this decree be forwarded for the informa-
 “ tion of the Central Board, in order that the pension
 “ of Rupees 5,000 per annum, which, in consideration
 “ of the sale of his estate, the Government had been

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“pleased to grant to *Lal Juggut Raj*, by its order
 “dated 1st *September* 1809, may be discontinued from
 “this date.”

From this decree the cause was carried by appeal to the *Sudder* Special Commission, acting under the Reg. I. of 1821. The *Sudder* Special Commission affirmed so much of the decree below as adjudged the annulment of the sale, and restoration of the *pergunna* to the Respondent, and reversed such part of the decree as awarded the payment of compensation, and directed the Appellant to be held responsible for the costs of the *Mofussil* Special Commission, according to its decree, and also of that Court. The ground on which this *Sudder* Special Commission proceeded in modifying, in the manner above mentioned, the decree of the *Mofussil* Special Commission, was, that there was evidence that the *Rajah* was not ignorant of the wrong and oppression which had been committed; that the purchase was, in fact, the purchase of the *Rajah*, concealing his interest under the name of the Appellant, *Baboo Deep Narain Sing*, and was therefore fictitious; that the sale was in contravention of an express prohibition of the Government; and that, as it was not the practice of that Court to award mesne profits to be paid by the possessor to the party kept out of possession, it would be improper to give the purchaser, who had derived an enormous profit from the estate, any compensation.

The Appellants appealed to His late Majesty in Council.

The Government did not appear or intervene in any of the proceedings before the *Mofussil* or *Sudder* Commission, but the East India Company, on the admission of the appeal to His late Majesty in Council, intervened and put in a case, and prayed leave to be

heard, so far as their interests were, or might be, concerned or affected by any adjudication on the matters involved in the appeal, and submitted that the *Sudder* Special Commission ought to be confirmed, in so far as the same decreed that no compensation should be paid by the Government on account of the sale of the *pergunna Barah*, by auction, having been annulled, or, at any rate, that it was not competent to the *Mofussil* Commission to award or assess any such compensation against the Government.

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Mr. *Kindersley*, Q. C., Mr. *G. Richards*, Q. C.,
and Mr. *Walpole*, for the Appellants.

Mr. *L. Wigram*, Q. C., and Mr. *Jackson*, for the
Respondents; and

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, Mr. *Ed-
mund F. Moore*, and Mr. *C. Buller*, Jun., for the
East India Company, intervening in the Appeal.

On the question of length of possession of the *zemindary* by the Appellants, it was contended that the Commissioners should have dealt with it in such way as Courts of Equity in *England* have done, and held the Respondent's claim barred by lapse of time. In support of which position, *Gregory v. Gregory* (a), and *Hovenden v. Lord Annesley* (b), were referred to. The other points raised during the argument are fully stated and considered in the Judgment.

The Vice-Chancellor KNIGHT BRUCE:

This case has been properly argued on the merits. The doubt suggested by one of the learned counsel for the Appellants, whether the district to which the se-

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(a) Cooper's Ch. Cases, 201.

(b) 2 Sch. & Lef. 632.

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mindary or *pergunna* in question belongs, was within the operation and powers of the Commissioners, whose judgments are before us, has not been insisted upon, and seems to us excluded from our consideration by the whole state of the cause.

We think also that the argument has rightly laid no stress on the circumstance of the son of *Lal Juggut Raj*, and not *Lal Juggut Raj* himself, though alive, having been the complaining party in the proceedings below. Having regard to the nature of the jurisdiction and question, the petition of *Lal Juggut Raj*, presented on the 1st of *March* 1825,* and the course taken by all parties, we could not have given effect to the objection if pressed.

The length of time also that elapsed between the sale of which complaint is made, and the commencement of these proceedings, though very properly urged as matter of grave consideration with reference to the judicial discretion to be exercised, and the mode of exercising it, has with equal propriety been admitted on the part of the Appellants not to form an objection to the jurisdiction, or a bar to relief in a case such as the present.

* This petition was presented to the Commissioners in consequence of their having directed *Lal Juggut Raj* to attend before them ; it pleaded (*inter alia*), "That old age, its infirmities, and the pain and grief arising from the loss of such a valuable patrimony, had so distracted the petitioner, that he was unable to attend on the Commission ;" and stated, "that it was then a long time that the petitioner had delegated to his son and sole heir the entire management and control of the family business, and retired into seclusion. That for the reasons above stated, he had discontinued attending public offices, and was, therefore, entirely ignorant of the rules and practices of the Courts ; and that he was consequently constrained to depend entirely on the exertions of his son, and the justice of his cause."

In the rejoinder, indeed, of *Deep Narain Sing* before the *Mofussil* Commission, he thus expresses himself upon the subject of time:—"That as the special pleas urged by this Defendant in his reply, filed in the Court of Appeal for the division of *Benares*, to show that Plaintiff's action was not cognisable by that Court, owing to the expiration of the period of limitation, &c., are considered inapplicable to the Special Commission with reference to the provisions of Reg. I. 1821, the Defendant will not therefore dwell upon them any longer in this place."

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The first point in question is, or rather was, whether this case could correctly be considered as coming within either of the predicaments enumerated in the second clause of the third section of Reg. I. of 1821, under which the proceedings arise.

It was, however, conceded on the Appellants' part, in an early stage of the discussion, that whether the *Rajah* of *Benares*, or *Deep Narain Sing*, was the real purchaser, the case fell within one of those predicaments, that, namely, of the purchaser having been "an officer on the Collector's establishment, or in any way employed in the collection of the public revenue within the district, or in the private service of the Collector, or the surety of such officer, or a relation, dependant, or connection of such officer or surety." A conclusion inevitable from the *ikrar-namah*, or agreement of the 14th of *August* 1802, entered into by *Chittroo Sing*, the *mokhtar*, or agent of the *Rajah*, wherein it is stated, "that whereas, in conformity with the application of the said *Maha-rajah*, the Collector of *zillah Allahabad* has conferred on *Teca Ram* the office of *tahsildar* of *pergunna Maheeya*, a dependency of that *zillah*; and on *Poorun Sing* the office of *tah-*

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sildar of pergunna Chael, also a dependency of the said *zillah*, he would, within the period of one month, present to the said Collector a formal deed of surety for these *tahsildars*, under the seal and signature of the said *Maha-rajah*;"—the letter from the Collector, of the 1st of *September* 1802, to the Board of Commissioners, recommending a sale of *pergunna Barah*, by public outcry, on the 30th instant, for arrears of revenue, due from *Juggut Raj*, stated to amount to R. 44,000, without deducting or alluding to the claim of *Juggut Raj* to have such demand reduced, and the orders made thereon;—and the security bond, dated the 5th of *September* 1802, given by the *Maha-rajah* for the two *tahsildars*, pursuant to the *ikrar-namah* of his *mokhtar*.

It may be true that the pleadings below do not suggest this pointedly, or do not suggest it at all. The terms, however, of the Regulation and of the Resolution or Order of the Governor-General in Council, dated 27th *February* 1821, the nature of the jurisdiction, and the simplicity of the fact, render the omission for the present purpose not material. Nor are we to be understood as meaning to express or intimate an opinion that there is not any other (we think on the contrary that there is at least one other) of the described predicaments within which the case is plainly brought. This, however, only establishes that the Commissioners had legal authority to set aside the sale, not that the power ought, in the particular case, to have been exercised. The question then arises whether as the Commissioners were not of necessity bound to exercise it, though legally vested in them, the Respondents' pleadings before them stated, and the documents and facts in evidence, proved a case

upon which it was a right and sound exercise of discretion, to set aside the sale.

The pleadings are in our opinion sufficient for the purpose, even independently of the enlargement from form and technical rules, which is conceded to proceedings under the Commissions, perhaps by the Regulation of 1821, but certainly by the Resolutions or Order of the Government, for giving effect to that law, of the 27th of *February*, in the same year.

The documents and facts properly in evidence, whether we reject the doubtful and suspicious part, or consider it in connection with what is authentic and worthy of reliance, appear to us, upon an attentive consideration of them, assisted materially by the able discussion to which they have been subjected from the Bar, to warrant the conclusion to which both Commissions have come; that the sale of the *zemindary* or *pergunna* in question ought, notwithstanding the great lapse of time, to be set aside.

But in agreeing thus far as we do with each of the tribunals below, we desire not to be understood as adopting or acceding to all the conclusions of fact, or as following or assenting to the whole of the reasoning upon which either Commission appears to have proceeded. And especially we think it right to say, that a perusal of the letter or despatch from Lord *Wellesley* of the 8th of *March* 1802, satisfies our minds, that the clause or passage on which reliance has been placed, as if it contained a positive prohibition of such a sale as that in question, at the time when it took place, does not bear that interpretation, that it was one of advice and recommendation, and not part of the orders or directions which the document contained.

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Though differing, however, from the mandatory construction which has been put on this passage, and which the context does not allow, we are far from saying that it is a circumstance in the case not deserving attention. On the contrary, it tends to show that the supreme Government recognized the general correctness and propriety of the views suggested by the Lieutenant-Governor in his despatch of the 7th of *January* preceding.

The extract from Lord *Cowley's* despatch, of the 7th of *January*, as printed in the papers before us, is thus:—"In realizing arrears of revenue in the Company's provinces, where other means fail, recourse is had to a sale of the land, and within the eleven last years this Regulation has occasioned the sale of a large proportion of the land, and the dispossession of a great number of the old *zemindars*. Some of these may have become inferior cultivators, and some may have sought other means of livelihood; but, under a Government so long and so well established, few have ventured, or, if they have ventured, few have been able to maintain themselves in a state of insurrection. But, from the temper, disposition, and character of the inhabitants of the ceded countries, particularly of the province of *Rohilcund*, I have no doubt that they would rather submit to the varied modes of oppression to which they have been accustomed under the *Nabob's* government, while their *zemindary* titles should be continued to them, than endure to be dispossessed of their lands in the most regular and legal mode under new Regulations. The former grievances they would think supportable, under the hope, however slender, of future redress, but the latter would drive them to despair—and from

the neighbouring countries, to which they might easily resort, they would continually infest their alienated lands. Though not prepared to give any specific detail on this subject, I am satisfied that where coercion is necessary to realize the dues of Government from defaulters, some mode less offensive should be devised, and a sale of the land only resorted to in the last extremity."

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The answer of the Governor-General to that despatch is this:—"No sales of land, for the recovery of rent due to Government, should be authorized within the ceded provinces, until a more effectual settlement of the country shall have taken place."

The sale under consideration, which took place in the very year in which these important papers were written, and in the countries to which they relate, was one of that very kind which Lord *Cowley* was satisfied should be only resorted to in the last extremity, as being a measure less tolerable in the estimation of the inhabitants of these provinces, so recently added to the British empire, than the different oppressions which they had borne under their native rulers, and as calculated to drive them to despair, but which Lord *Wellesley* considered should not take place at all before a more effectual settlement of the country—a settlement that, according to our view of His Excellency's meaning, had not taken place at the time when the sale was made.

It may be said, that it was made with the sanction of the local Government, of which Lord *Cowley* was a prominent member, or the chief under the supreme Government. The sale, however, was not at *Bareilly*, but at *Allahabad*. The authority for it, if, upon the whole view of the circumstances, authority there was,

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which proceeded from *Bareilly*, was consequent upon the representations of the case made to the provisional Government by Mr. *Ahmuty*, the then Collector at *Allahabad*—representations which, as they appear to us, placed the defaults and conduct of *Lal Juggut Raj* in a light stronger and more unfavourable to him than the facts, so far as we are enabled to judge of them, really warranted. The Government at *Bareilly* may have been led to think that the case was one of the last extremity. We do not see grounds for holding that it was of that character.

Considering the circumstances under which *Roy Madary Lal* had obtained the increased *jumma* from *Lal Juggut Raj*, the large amount of that increase, the position in which himself and his property had been placed, when the subsequent documents obtained from him were obtained, the questionable and doubtful state of his accounts before, and at the time of the sale, as appears from Mr. *Ahmuty*'s report, of 4th of November 1802, and from other sources, the high degree of probability, if not certainty, that had *Lal Juggut Raj* been allowed all that ought to have been allowed to him, the balance claimed from him would at least have been greatly reduced; considering the harsh measures used towards him, the pressure under which he was placed, during the earliest period of a Government, and an administration of public affairs, which were altogether strange and new to the country; not forgetting also the kind of notices by which the sale was preceded, and the circumstances generally by which it was accompanied and immediately followed,—we cannot, consistently with the declared object and intention of Reg. I. 1821, avoid saying, that the sale, if not protected by length of time, ought not to

stand. And that, having regard, on grounds of private justice, to the state of embarrassment, difficulty, and distress to which *Lal Juggut Raj* was reduced, as well as to the powerful adversaries opposed to him, and on grounds of general policy to the motives and spirit of the Reg. of 1821, it would be inequitable and publicly inexpedient to permit such a title to be protected by the lapse of time that has taken place. The effect that it ought to have as to the terms and conditions which should accompany the Appellants' deprivation of the property, is open to very different considerations.

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Without entering into a more minute detail than is necessary, or may be expedient, we consider it right to add, that among the evidence which has most strongly influenced our minds with regard to the character of the sale, the conduct of those concerned in it, and the manner in which it should be treated, are the following documents, to which it may be as well to refer in a chronological order, commencing at a time less, we believe, than two months after the cession by the *Nawab Vizier* :—

1st. The *perwanna* to *Juggut Raj* of the 4th of *January* 1802, from the Collector, requiring him to remit on that day the Government revenue which had been called for, and promising him permission to return on the day following. The *ikrar-namah* of the 5th of *January*, of *Baboo Nek Sing*, the *sazawal*, or tax-gatherer, who had been appointed in consequence of the absconding of *Juggut Raj*, undertaking to collect the revenues due from the *pergunnas* held by him, of the next day's date. The letter and advertisement for *Juggut Raj's* apprehension, of the same date,

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coupled with the Collector's despatch to *Bareilly*, also of the 5th of *January* 1802, stating thus as to *Juggut Raj's* property :—"I have deputed a *sazawal* (*Baboo Nek Sing*) to make the collections from the *zemindars*, and as *Juggut Raj's* profits were considerable, these *pergunnas* will still yield sufficient assets to ensure the revenue of the current year to its full extent :'' stating also this—"I have issued the necessary orders for the attachment of *Juggut Raj's* property, and have directed the several officers to be vigilant in apprehending his person, should he attempt to enter the Company's jurisdiction."

His despatch also to Captain *Worsley*, of the same date, in these words :—"Sir, I am just informed by one of my *sawars* (horsemen), that *Jaggut Raj* was safely lodged in the fort of *Loundeh*, with a party of 300 followers. On the supposition that this account is correct, I think it will be advisable, in the first instance, to summon *Juggut Raj* to deliver up the fort, offering him the protection of Government in the event of his settling his *wasilat* for the current year. Should *Juggut Raj* make any resistance, you will be pleased to adopt the necessary measures for securing the fort, if you conceive from local investigation that such an event is practicable with the small force at present under your command, otherwise I could wish you to prevent his escape, if possible, till further assistance can be afforded. In the mean time you will report to me, should *Juggut Raj* decline to deliver up the place, the strength of the fort, the force that is likely to be opposed to you, as well as the additional troops you will require for obtaining possession and securing the person of *Juggut Raj*. If the immediate

aid of the detachment of police is required, you are authorized to withdraw that company for the present service.”

We will next notice the Collector's letter of the 9th of *January* 1802, four days after, to *Juggut Raj*, informing him of the rejection of his petition to be released from the amount of collections due from him, and requiring him to make over his *wasilat* papers to *Baboo Nek Sing*, and to attend the Collector and settle his affairs. The several *perwannas* to *Baboo Nek Sing*, of various dates, in *January* and *February* 1802, directing him to collect the revenues, and to report respecting the adjustment thereof, and to *Juggut Raj* and his *dewan*, requiring him to discharge the arrears, and promising safety to his *dewan*, if he will attend and pay up the arrears. The Collector's letter of the 9th of *February*, to Mr. Mercer, the secretary of the Board of Commissioners, respecting the measures taken by him regarding *Juggut Raj* and the *Pergunna* in question ; and the *kowl-namah*, or agreement, of *Baboo Nek Sing* with *Juggut Raj*, of 21st of *February* 1802. The bond and petition of *Lal Juggut Raj*, of the same 21st of *February* 1802, agreeing to pay the revenue of the *pergunna* in question. The *perwannas* to *Baboo Nek Sing*, of the 23rd of *February*, requiring him to render up and transfer to *Baboo Ram Kishen* the *pergunna* records ; to *Baboo Ram Kishen* and to *Juggut Raj*, of the 24th of *February* 1802, directing them to take charge of the same. The several *perwannas* and petitions of various dates, between the 24th of *February* and the 16th of *April*, both inclusive, all respecting the realization of the collections from the aforesaid *pergunnas*. The Collector's narrative, or order, containing a statement on the subject of *Lal Juggut Raj's*

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affairs and transactions, from the 20th of *December* 1801, to the 16th of *April* 1802. The *perwanna* to *Ram Kishen Sing* of the 17th of *April* 1802, containing further directions to collect the revenues from *pergunnas Arael* and *Barah*. The notice of the appointment of an *Amin* to act as arbitrator, for making the settlement of villages still remaining unassessed; the *perwannas* to collect the revenue; and the advertisements for sale, of various dates in *May* and *June* 1802. The petition of *Lal Juggut Raj*, complaining of inaccuracies in the account receipts of *Baboo Nek Sing*, with the Collector's answers or orders upon it, dated the 17th of *June*, and 2nd of *July* 1802. The estimate, memorandum, or sketch of account of the revenues of the *pergunnas Arael* and *Barah*, as prepared by the Collector, and upon which the bond from *Juggut Raj*, for the payment of the estimated amount by instalments, of the 29th of *June* 1802, was founded, the bond itself, and the surety, or bail-bond, of the 2nd of *July* following, of *Goman Sing* and others, for securing the same, and for the appearance of *Juggut Raj*, being all substantially contemporaneous with the petition, and the answers or orders upon it, just mentioned.

Next, the letter of introduction and recommendation from the *Rajah* of *Benares*, of *Chittroo Sing*, the agent and superintendent of the *Rajah's* household affairs, of the 25th of *July* 1802, and the documents of 14th of *August* and 5th of *September*, already mentioned, with respect to the suretyship.

Then the letter to the Board of *Bareilly*, from Mr. *Ahmuty*, dated 1st *September* 1802, more than three weeks before the period appointed by the bond dated the 29th of *June*, for the payment of the instalment of

R. 32,206. 15 a. 3 p., but silent as to that transaction, though recommending the sale of the *zemindary* of *Barah*, between which letter and the date of the answer to it (the answer being dated 11th *September*) occurs the advertisement of 8th *September* for the sale of the *zemindary* on 30th *October*.

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The answer of 11th *September*, from the Board of Commissioners to Mr. *Ahmuty*, the time of the receipt of which does not appear, but which runs thus :—
“Sir, I have the honour to acknowledge the receipt of your letter of the 1st inst., and am directed, by the Honourable the Lieutenant-Governor, and Board of Commissioners, to inform you that, as it appears from your letter that *Juggut Raj* still continues to persist in declining to pay the balance due from him, they authorize you to issue a proclamation, setting forth that, unless *Juggut Raj* shall appear and agree to a fair and equitable adjustment of his accounts, his estate will be publicly sold, at a period to be fixed by you, which the Board are of opinion should be rather later than the 30th of *September*, in order to afford sufficient time to *Juggut Raj* to avail himself of the opportunity now afforded to him for a satisfactory and amicable adjustment of his account.”

We would, then, notice the advertisement of 18th of *September*, fixing 10th of *October* as the day of sale, and the contemporaneous *perwanna* to *Juggut Raj*, “inviting him to attend upon the Collector with confidence, and arrange his affairs ;” and informing him that in the event of non-attendance, his *zemindary*, *pergunna Barah*, will be sold by public auction on the day advertised : the 25th of *September*, being the last instalment day named in *Juggut Raj*’s bond, not having yet arrived.

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Then, the advertisement of the 5th of *October*, which is in these words: "On the 18th of *September* 1802, A.D., an advertisement was published, stating, that on the 10th of *October* prox., *pergunna Barah*, the *zemindary* of *Lal Juggut Raj*, would be sold by public auction, for the recovery of a Government arrear. It is now ordered that the said advertisement be cancelled, and in lieu of it another advertisement be issued, in conformity with the orders of the chief Board, under date the 11th of *September* ult., to this effect—that whereas the said *Juggut Raj* withholds the payment of a large amount of revenue justly due to Government, and contumaciously and fraudulently evades its discharge, should the aforementioned, therefore, personally attend and pay up the arrear justly due by him into the public treasury by the 30th of *October* inst., good ; else the *pergunna* of *Barah*, the *zemindary* of the aforementioned person, will be sold by public auction on the aforesaid date, in liquidation of the Government balance, and the auction purchaser of the said *pergunna* will be entitled," &c.

This advertisement may or may not be the same with that which is found in the papers, and bears date the 7th of *October*, and which is to the same effect ; it is, therefore, not very material to insist upon any difference between the two.

Then comes the Collector's letter to the Board of Commissioners of the 6th of *October*, wherein he says : "I have to acknowledge the receipt of your letter of the 11th ult. ; and have to request that you will be pleased to report to the Honourable the Lieutenant-Governor and Board of Commissioners that, in conformity to their order, I issued on the 1st instant a proclamation, setting forth, that unless *Juggut Raj*

shall appear and agree to a fair and equitable adjustment of his accounts, his estate will be publicly sold on the 30th of the present month," and so on. "I have further had conveyed to *Juggut Raj*, who resides at present in *Bundelcund*, a copy of the proclamation, together with a *perwanna* from myself, encouraging him to return to his estate."

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Lastly comes the record of the proceedings of the 30th of *October*, the day when the business was completed, the day of sale, closely followed by Mr. *Ah-muty's* despatches to the Board at *Bareilly*, of the 4th of *November* and 30th of *November* 1802, between which, and probably after which, that Board communicated with him, though to what effect is not disclosed, and seems not to be known. These despatches exhibit not only uncertainty as to the amount of the debt due, or to be considered as claimable, but a want of accuracy on the part of the Collector.

We are not unaware of the propriety and expediency in general, of giving great weight to acquiescence or delay on one side, and to long possession on the other, or of the generally questionable policy of discrediting or lessening the public faith in transactions having the sanction of the Government or its officers. These and similar considerations were, however, in the cognizance of the framers of the Regulation of 1821, and by them it was decided to be, on the whole, just and expedient, that in the peculiar position in which the inhabitants of this part of *India* were placed at the commencement of the British rule, there should not be applied to the investigation of the peculiar transactions, and the redress of the peculiar hardships which then took place, merely ordinary principles.

The Regulation of 1821 was preceded by Mr. *Stuart's*

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Minute of 1820, containing these passages :—" I solicit the attention of the Board to a matter of considerable importance. During the first six or seven years which followed the acquisition of the provinces ceded to us by the *Nawab Vizier*, the mal-administration of *Allahabad*, and some of the neighbouring districts, combined with the intrigues and influence of certain opulent and powerful natives, and the poverty and ignorance of the *zemindars* and *talookdars*, led to the abusive alienation, to a great extent, of landed estates within those districts, and to the consequent ruin and extreme misery of the proprietors. For a full detail of those transactions I refer to the reports from the Board of Commissioners."

He then refers to certain documents which are mentioned, and he proceeds to say: "From these documents of which, for convenience of reference, extracts are annexed to this paper, the Board will observe that a Special Commission was strongly recommended by the Board and Mr. *Fortescue*, for the purpose of investigating the alleged abuses, and affording redress to the injured parties. The consideration of the measure was postponed for the time, and has not been since resumed, owing, probably, to the suspension of the introduction of a permanent settlement into the ceded provinces. Now that the measure of settlements in the ceded and conquered provinces, upon fixed and permanent principles, is again under consideration, I venture strongly to recommend to the Board the institution of a Special Commission as formerly suggested, for the purpose of investigating the abusive alienations in question. I beg accordingly to submit to the Board the accompanying paper, comprising an outline of the plan upon which the Commission should be instituted.

The investigation of these cases, with any hopes of success, will require a thorough research into voluminous and complicated revenue accounts. It will require local inquiries, and free and constant communications with the parties themselves, and with the local officers. The delays and forms of the Courts of Justice oppose great obstacles to their conducting investigations upon those principles; and the parties injured are equally incapable of supporting the expense of protracted litigation, and of defending themselves in that course of proceeding against the arts and intrigues of their opulent and powerful adversaries. These reasons I have no hesitation in urging as fully justifying a special deviation from the ordinary system of our judicial administration. The delay which has occurred is unquestionably to be regretted, but I cannot think it is a sufficient ground for excluding the injured parties from redress. It is a noble principle of the English law, that no time shall avail in favour of fraud; and I believe that there were never transactions to which the maxim was more justly applicable. It would be an afflicting reflection, that men who have acquired estates by the basest means, should enjoy all the advantages of a permanent settlement, while their victims should have their misery heightened by being the hopeless witnesses of the increasing value of the property of which they have been so iniquitously despoiled."

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The Preamble of the Regulation of 1821, so far as it is material now to quote it, is thus expressed: "It has appeared that, in the first seven or eight years after the acquisition of the ceded provinces by the British Government, the native Officers of Government, their relations, connections, and dependents,

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taking advantage of the novelty of the British rule, of the weakness and ignorance of the people, and (in some cases) of the culpable supineness and misconduct of the European functionaries, under whose authority they were employed, contrived, by fraudulent and iniquitous practices, to acquire very extensive estates, in several of the provinces in question, more especially in the districts of *Allahabad*, *Cawnpoor*, and *Goruckpoor*; thus wrongfully depriving of their just rights, a great number of the ancient land-owners, and reducing them and their numerous dependants to ruin and misery. These abuses have been chiefly practised through the perversion, to the purposes of chicanery and fraud, of the rules enacted for the collection of the Government revenue, more especially the provisions relating to the public sale of land for arrears. Under cover of these rules, but contrary to the true intent and meaning of the law, by which (though a considerable discretion was left to the Revenue authorities) the measure of a public sale was principally designed for cases of embezzlement, contumacy, or fraud, many estates were sold, from which no balance (or a very trifling balance) was due, or on which the arrear accrued without any embezzlement or wilful default on the part of the *Sudder malguzar*; and others were disposed of without an observance of the prescribed forms;" and then other circumstances are alluded to.

In a subsequent part of the Preamble it is said—
 "The persons who have suffered by the aforesaid abuses, are, for the most part, poor and ignorant men, unaccustomed, under the former Government, to any regular system of law, little acquainted with the principles of the British Code, or the regular forms of

British judicial proceedings, incapable of availing themselves of the protection it was designed to afford, and possessing not the means of securing the aid of individuals better informed, while those opposed to them are, for the most part, men of wealth and power.”

It then goes on to make other important observations with reference to that subject, and proceeds thus:—“The proceedings of the established Courts must necessarily partake of any defects belonging to the law, which it is their duty to administer, and it would be obviously inconsistent with every sound principle, to grant a general discretion to those Courts, to deviate from the law on individual views of expediency or justice.” And then, after some further remarks, it is thus expressed:—“In consideration of the above circumstances, it has appeared to the Governor-General in Council, to be essentially necessary to the ends of justice, that a Special Commission, with large discretionary powers, and with full authority to regulate its proceedings, according to the exigencies of the cases brought before it, should be constituted for the purpose of investigating the cases above described, of restoring to their just rights the *zemindars*, and other proprietors, who have been wrongfully dispossessed,” and long settled under our Government.”

The subsequent Resolution or Order of the Government, of *February* 1821, had these passages:—Paragraph 13. “In cases, however, in which the Commission may adjudge compensation, not exceeding R. 1,000, or in which they may adjudge the repayment, by Government, of the purchase-money of any *mahal*, of which the sale may be annulled, or in which they may direct the price of the stamped paper, used for a plaint or petition of appeal, in lieu of the institution-fee, to be

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returned to the party by whom the amount may have been disbursed, an order signed by the Commissioners, and specifying the nature of the charge, shall be sufficient authority for the Collector of the district immediately to pay the amount.”

Paragraph 22. “With regard to the Rules of practice, and forms of proceedings to be followed by the Commissioners, his Lordship and Council presumes that it will not be necessary materially to deviate from the course followed by the Civil Courts, with this important exception, that it shall be specially their duty to institute an active inquiry into all the circumstances of the cases brought before them, and to take their own course for the investigation of the truth, without confining themselves to the points stated by the parties, or by any technical forms of pleading or management.”

Paragraphs 25 and 26 are of the same character.

Paragraph 32, is thus.—“It is not, however, the personal character of the officers entrusted with the administration of civil justice, that has chiefly led to the institution of this official tribunal. In determining on the measure, his Lordship in Council has been still more influenced by the persuasion, that the system under which those Officers have to act, and the laws which they were bound to administer, are seriously defective in their application to the ceded and conquered provinces. While the principles of Revenue management were very imperfectly settled, the Revenue authorities have been compelled to decide on the most important points relative to private rights amidst the uproar of a general settlement, and under the urgency of securing the Revenues of inordinately extensive districts. That they should have frequently

erred, can excite no surprise; that their errors were extensively injurious, it would be preposterous to doubt. In many instances those errors admitted of no legal remedy by the Courts, because they were committed in the exercise of a discretion which the Courts could not legally control; and that the ordinary tribunals should, among a people new to our rule, and accustomed to the arbitrary domination of native *amils*, have failed to protect the agricultural community from the consequences of the acts of the officers of Government, even where those tribunals were competent to interpose, is assuredly no impeachment of the individual functionaries by whom they were filled, nor any conclusive proof that they are not generally well adapted to secure the impartial distribution of justice between individuals, and in territories long settled under our Government."

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Some time afterwards, the Regulation I. of 1823 provided that, "First. Such part of cl. I, sec. 3, Reg. I. 1821, as restricts, or can be construed to restrict, the cognizance of the Commissioners acting under the provisions of that Regulation in the matter of suits to recover possession of lands lost through public sales, to cases wherein such sales have been effected by the undue influence of a public officer, is hereby rescinded. Second. In the several cases specified in cl. 2, 4, 5, and 6, sec. 3, Reg. I. 1821, as well as in all cases wherein it may appear that any Plaintiff has been deprived of his rights by an illegal sale made within the period specified in the first clause of the said section, it shall and may be lawful for the Commissioners acting under the provisions of that Regulation, to take cognizance of any suit preferred to them, and to pass

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judgment on the same, although there may be no proof that undue influence was exercised by any public officer, to the injury of the Plaintiff. Third. Provided also, that in the cases specified in cl. 3, of the afore-said section, if there shall be proof, or strong presumption, that the purchase or acquisition of the property sued for, was effected by violence, extortion, oppression, or fraud, it shall not be necessary for the Plaintiff to plead, or establish that undue influence was exercised."

It is in the spirit mainly of these portions of the important documents to which reference has just been made, that we have deemed it right to construe the letter of the Regulation I. of 1821. Upon that construction we consider that the *Mofussil* Commission rightly held it to be within their competency to set aside the sale, upon the terms of a payment to be made by the party succeeding in the contest to the party dispossessed by the decision, and rightly also held that the present was a case which the terms of cl. 2, of sec. 4, Regulation I. of 1821, might not improperly be held to include.

That clause is thus: "In cases in which the Commission may deprive any person of rights legally vested in him, under the existing code, or may make award upon doubtful claims, or in which the title of any person, though invalid, may have been acquired by him, *bona fide*, under an express or implied assurance of its validity on the part of the Board, the Collector, or Judge of the District, it shall be competent to the Commission to adjudge compensation in money from the Treasury of Government: provided, however, that in cases in which the compensation assigned to any individual shall exceed the sum of R. 1,000, the sanc-

tion of Government shall be necessary to authorize the disbursement.”

A prior clause, the eighth of sec. 3, had provided thus : “ The operation of the foregoing clauses shall not be confined to cases in which lands, or rights connected with land sold, transferred, alienated, or usurped, as above, may be held by the person originally benefiting by the sale, transfer, alienation, or usurpation, but shall equally extend to those in which the said lands or rights may be held under a title derived from such person: Provided, of course, that in cases in which it may appear that the person so holding under a derivative title was in no degree concerned in, or cognizant of; the original wrong, the claims of such person to compensation for any loss he may sustain under the operation of the present Regulation shall be held entitled to a very liberal consideration.”

We do not on the whole think it an undue extension of cl. 2, sec. 4, to say that this case may be held to come within one of the predicaments which it describes: nor can we agree with the *Sudder* Commission in their conclusion that justice or policy did not in this case require the power of directing a payment by the successful party to the party deprived of possession, or the power conferred by cl. 2, sec. 4, to be exercised; it being our opinion, having regard to the benefit which to a certain extent *Lal Juggut Raj* derived from the purchase-money, to the course of conduct not certainly altogether justifiable, which previously to the sale he had pursued, to the great length of time that was suffered to elapse before the sale was judicially questioned, to the part which those entrusted with the functions of the local Government took in the sale, and to the

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nature and extent of the allegations and evidence by which it has been endeavoured to impeach the conduct of the late *Rajah* of *Benares* in respect of it, that both justice and policy required each of these powers to be called into action.

We think, also, upon a review of all the circumstances of the case, especially those to which reference has just been made, that it was, on the whole, proper to leave the Appellant and the late *Rajah* of *Benares* free from any account or charge in respect of the income and profits of the purchased property, from its acquisition in 1802, to the date of the *Mofussil* decree. Proved, as we think it is, by the conduct of the parties and otherwise, that the clear profits and net income derived from this source by the *Rajah* and *Deep Narain Sing*, or one of them, must have much exceeded the amount of the interest for the same time, calculated at the rate of 12 per cent. per annum, upon the R. 93,000 (the purchase-money), we consider it right, under all the circumstances (and among them, attending to the fact of the pension which the Government for some years paid to the Respondent or his family), that any claim on the part of the Appellants or the late *Rajah* of *Benares*, in respect of interest on that sum, should be treated as satisfied, but not as more than satisfied, by the income and profits ; and we shall not advise Her Majesty to direct any account in this respect.

With regard to the true state of the accounts between *Lal Juggut Raj* and the Government, if taken on just and equitable principles up to the time of the sale, as well as with regard to the mode in which the sum of R. 93,000 was applied, it is probably at this time very difficult, if not impossible, to arrive at any

exact conclusion. The *Mofussil* Commission, which appears to have examined and considered the details of the facts of the case with most commendable care and attention, held, that of the R. 93,000, the sum of R. 26,458. 6 a. 6 p. ought to be considered as the total amount of benefit received by *Lal Juggut Raj*; nor do we see that the *Sudder* Commission viewed this particular point differently.

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In such a state of things, satisfied as we are that this conclusion in point of amount, whether precisely and exactly, or not precisely and exactly, accurate, is not far remote from the truth; and unable with confidence to pronounce that it is to any extent inaccurate, we do not feel ourselves warranted in dissenting from this part of the decision of the *Mofussil* Commission.

Our view, however, of the facts and of the spirit and intention of the second clause of sec. 4, leads us, as has been stated, to the conclusion, that not only the residue of the R. 93,000, but a further sum by way of compensation, ought in this case to be paid by the East India Company to *Deep Narain Sing*. We had hoped that its amount, and this portion of the cause generally, might have been arranged by the East India Company and the parties for themselves. As it appears, however, that this cannot be done, we have been obliged ourselves to undertake the duty of fixing the amount of compensation.

Under the various and conflicting considerations to which the case is liable, and with such knowledge as we possess on the subject, we have felt much difficulty in performing this task. But judging as well as we can, after due allowance made in respect of the pension already alluded to, we deem R. 27,000 a proper sum. We conceive, therefore, that R. 120,000, with interest

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at the rate of 5 per cent. per annum (which we think the proper rate), from the date of the *Mofussil* decree (from which date we consider the Respondent as entitled to the enjoyment of the property in dispute, as between him and the Appellants), should, in respect of the sale being set aside, be paid by the East India Company to *Deep Narain Sing*, and that the East India Company should, in their accounts with *Lal Chutterput Sing* and *Lal Juggut Raj*, charge them, or one of them, with the principal and interest of the above-mentioned amount of R. 26,458. 6a. 6p.; a mode of arranging the matter which we consider due alike to them and to *Deep Narain Sing*, having regard to the proceedings that have taken place in *India* since the *Mofussil* decree.*

We may add, that so far as the East India Company is concerned in this matter, it is far from irrelevant to notice the view taken of it officially by such public functionaries employed in the administration of their affairs, as Mr. *Colebrooke* and Mr. *Deane*, who, in the year 1808, a period not far removed from the time of the sale, but when, of course, the special law introduced by the Regulation of 1821 did not exist, reported on the subject to the Government in Council thus :—“ We have the honour to submit for your Lordship’s consideration a Petition, which has been presented to us by the former Proprietor of *pergunna Barah*, in the district of *Allahabad*, complaining of the sale made of his *zemindary* in the year 1802, together with translation of two documents produced by him, and copies of the correspondence which led to the

* These proceedings showed that the Government had been in possession of the *pergunna* from shortly after the date of the *Mofussil* Decree.

sale. Your Lordship will observe from the correspondence, that *Rajah Juggut Raj* had engaged, during the *Vizier's* Government, for the *pergunna* of *Arael*, in addition to his own *zemindary* of *Barah*," and so on. Mr. *Colebrooke* and Mr. *Deane* then gave a short summary of the facts, ending thus :—"That on the 2nd of *July*, Mr. *Ahmuty* admitted the validity of *Juggut Raj's* claim to certain items of credit, as deductions from the balance adjusted on the 17th *June*, which items *Juggut Raj* states in his account to have exceeded the balance charged to him, and which, if adjusted in time, might, previous to the Collector's letter of the 1st *September*, have considerably reduced, perhaps entirely extinguished, the arrear. Mr. *Ahmuty's* letter of the 4th *November*, and the account produced by *Juggut Raj*, both agree in making the gross balance, adjusted on the 17th *June*, R. 72,207, and the net balance on the *sudder jumma*, R. 44,332 ; the difference, R. 27,875, Mr. *Ahmuty* calls a deficiency on the assets of the *pergunna*, while the documents produced by *Juggut Raj* show it to have been those disputed items for which Mr. *Ahmuty* promised *Juggut Raj* a remission in the event of Government authorizing it, or his assistance for the recovery thereof, from the parties actually owing the money, if the remission should not be authorized. It does not appear, however, that any report on the subject was ever made to the Lieutenant-Governor, or any measures adopted for the realization of the amount from those on whom (and not on *Juggut Raj*) the loss should have fallen, or any steps taken for the adjustment of those items on which Mr. *Ahmuty* had promised to give credit. The sale of *Juggut Raj's* estate seems, on the contrary, to have been resorted to by Mr. *Ahmuty*, as the readiest

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mode of settling an intricate account, and of discharging every pledge on his part.” Then follow two paragraphs, which it is unnecessary now to read, and the concluding paragraph is this :—“ It is too late to regret that the first measure of the British Government, on the introduction of its authority into the province of *Allahabad*, should have been the sale of one of the largest *zemindaries* in it, and the extirpation of an old and respectable family; and at this distance of time, the interposition of Government may probably be no longer of any avail. After a lapse of six years, it must be scarcely possible to revise the collections of the successive *sazawals* deputed by the Collector, or to revert to the different persons on whom the Collector had engaged to enforce *Juggut Raj*’s claims; and from the retirement of the public officer, through whose concealment of some, and misrepresentation of other, material facts, the sale was ordered, all redress seems to be precluded. At the same time, therefore, that we submit the case to Government as one of peculiar hardship, we confess ourselves at a loss to frame any specific proposition in regard to it; should, however, every other redress be impracticable, your Lordship may possibly consider *Juggut Raj*, under all the circumstances, entitled to some provision from Government.”

Nor does it end there, since the subsequent papers on the subject, including the grant of the pension of R. 5,000 per annum to *Lal Juggut Raj* in the following year, 1809, to which reference has already been made, show that the Supreme Government of *India* entertained substantially the same view of the case as that taken in the despatch of Mr. *Colebrooke* and Mr. *Deane*.

We shall humbly recommend to Her Majesty to affirm the *Sudder* decree, except as to compensation and restitution money, and costs, and to order that the East India Company shall pay to the Appellant, *Deep Narain Sing*, the sum of R. 120,000, with interest at 5 per cent. per annum, from the date of the decree of the *Mofussil* Commission—this sum to be considered as in full for compensation and restitution money, in respect of setting aside the sale; and to declare, that by its payment, all claim for interest, on one hand, and for rents and profits on the other, between the Appellant and the late *Rajah* of *Benares* and the Respondent, is to be considered as extinguished; and that the debt, if any, between the Government and *Lal Juggut Raj* at the time of the sale, and all claim against the Government, in respect of having made the sale, are to be deemed in like manner to be extinguished. But that the sum of R. 26,458. 6a. 6p., part of the sum of R. 120,000, is, with the interest from the date of the decree of the *Mofussil* Commission, at the rate of 5 per cent. per annum on the R. 26,458. 6a. 6p., to be made good to the East India Company, by charging, and they are accordingly to be at liberty to charge, the Respondent in account therewith, and they are to be at liberty to deduct the same from what may be coming from them in respect of the *zemindary*, its profits, or revenues. Each party is to bear his own costs of every stage of the proceedings, from their first commencement before the *Mofussil* Commission to the present time, with liberty to apply to the *Sudder* Commission.

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 MAHADEW ROW, GUNGA-JEE ROW, } *Appellants,*
 and GOVIND ROW, - - - - - }

AND

TRIMBUK-JEE and JAGO-JEE, - - - *Respondents.**

*On Appeal from the Sudder Dewanny Adawlut
 of Bombay.*

Bombay Limitation Regulation (V of 1827), S. 7, Cl. 2—Construction—Hereditary Office—Suit in respect of—Limitation—Exclusion of period—Sufficient cause—Sanad evidence of claim preferred—Value of—If adjudgment having binding force—Admission—What amounts to.

A claim preferred before the *Peishwa* in 1813, previous to the British rule, but upon which no adjudication was made: Held sufficient to bring the claimant within the exception of sec. 7, cl. 2, of the *Bombay Reg. of Limitation*, V. 1827, notwithstanding adverse possession, for 30 years previous to the institution of the suit.

There being two sets of Appellants, having separate interests and adverse claims against each other, as well as against the Respondents, the Judicial Committee permitted two Counsel to be heard for each set of Appellants.

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THE subject matter in dispute in this Appeal was certain property and valuable rights and privileges belonging or incident to the hereditary office, under the *Mahratta* Government, of *deshmook* of the division of *Khidool* in the *Gorut pergunna* in the *Moorbad talook*, the annual income of which amounts in the whole to 1,106 rupees, 1 quarter, and 94 reas.

The property which was the subject of this claim consisted of the following particulars:—The profits and receipts of the *zemindary*, which was attached to the office of *deshmook* as a revenue office, amounting to R. 139. 44. annually; certain fees of office, levied from the inhabitants of thirty-one villages within the local extent of the jurisdiction of the office, amounting to 500 rupees a-year; the rents and profits of certain waste land held in *enam*, or free gift, amounting to R. 272. 1. 50. a-year; the *pitra*, or ceremony performed for deceased ancestors, to be collected at the rate of one rupee from each village, amounting an-

* Present: Members of the *Judicial Committee*,—Lord Campbell, Mr. Baron Parke, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—Sir E. Hyde East, Bart., and Sir A. Johnston, Knt.

nually to R. 30; certain contingent charges collected from each village annually, being altogether R. 15, and the toll on transportation of goods levied at the lesser *talghat*, amounting to R. 150. Of these particulars (the total yearly income of which was the above-mentioned sum of R. 1,106. 1. 94.), the Plaintiff was himself in possession of twenty *beegas* of the waste land held in *enam*. The toll levied at the lesser *talghat* was received by the Appellants, *Mahadew Row*, and *Gunja-jee Row*, and *Govind Row*, sons of *Toolja-jee Row*, three of the Defendants in the original suit, and the rest of the property comprehended in the claim of the Plaintiff was in the possession of the remaining Defendants, who were eighteen in number.

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In addition to the above-mentioned particulars, there were also attached to the office of *deshmook* of the division of *Khidool* two *isafut*, or service-tenure villages; one of these villages, namely, the village of *Belgam*, was in the possession, or under the management, of the Plaintiff; the other of them, the village of *Sael*, was in the possession of the eighteen Defendants. The fees which were levied from each of these villages properly belonged to the party under whose management the village was, and on that account the income derived from them was not included in the claim of the Plaintiff.

The question at issue regarded not merely the right of the parties to the emoluments appertaining to the office, but the proportions in which they were severally intitled to possess them; and a further question was also raised, viz.,—whether the suit was barred by the *Bombay Regulation V. 1827*, for limiting the time for prosecuting civil actions. By cl. 1, sec. 1, of that Regulation, it is provided that “Whenever lands, houses,

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hereditary offices, or other immoveable property, have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs, or others deriving right from him, such possession shall be received as proof of a sufficient right of property in the same;" and by cl. 2, sec. 7, it is provided, "Also, if the claimant have within the time of limitation preferred his claim to any authority (arbitration included competent to try it, and satisfactory reason be shown why a decision was not passed, (such reason nowise affecting the justice of the demand,) then the period of limitation shall be reckoned from the date of the last proceeding known to the Defendant in such case."

On the 5th of *September* 1829, *Chand-jee*, who died pending the suit, filed his plaint in the Court of the Assistant Collector of the Northern *Concan*, against the three Appellants, *Mahadew Row*, *Gunja-jee Row*, and *Govind Row*, and against *Jewa-Jee*, son of *Luximon Sooria Row*, and seventeen others, being in all twenty-one Defendants, who were respectively in possession of the particulars before-mentioned, and refused to allow the Plaintiff to participate therein. The nature and origin of the Plaintiff's title, as detailed in the *Plaint*, were as follows:—*Cano-jee*, son of *Bap-jee*, commonly called by name *Sooria Row*, and formerly *deshmook* of the division of *Khidool*, was the common ancestor of the Plaintiff and the Defendants. *Cano-jee* had two sons, and the Plaintiff was the sole male descendant of the elder, who was named *Tooka-jee*; the younger son of *Cano-jee* was named *Bhica-jee*, from whom all the Defendants were alleged to be respectively descended. The Plaintiff claimed to be entitled to one half share of the estate attached to

the aforesaid hereditary office of *deshmook*, held by the common ancestor of himself and the Defendants, and descended upon them from him. The management of this estate was formerly conducted by the ancestors of the parties, but at a subsequent time, in consequence, as was alleged, of there being no person in the Plaintiff's branch of the family competent to conduct the affairs of the estate, the management of it was undertaken by the ancestors of the Defendants; who at all times, upon the occasion of marriage and other ceremonies at the house of the Plaintiff and his ancestors, was said to have defrayed the expenses. A dispute afterwards arose between the Plaintiff and *Mal-jee*, son of *Ana-jee Sooria Row*, the ancestor of the Defendants, whereupon the Plaintiff made complaint to the *Soobadar*, or Governor of the *talook Junere*, under the *Peishwa's* government, who gave the parties a letter of instruction to *Ana-jee Row*, to cause an amicable settlement to take place. The Plaintiff stated that since that time about forty-two years had elapsed, and in order to bring himself within the period of thirty years, which is the period of limitation applicable to the subject of the suit, he made the following statement:—"Subsequently to the above proceeding, during the administration of *Pursaram Khundi Row*, *Soobadar* of the said *talook*, I went to his agent at the place called *Junere*, to complain about the said hereditary estate. For many days the nephew of *Ana-jee Sooria Row* (by name *Trimbuk-jee*, son of *Es-jee Sooria Row*, a blood relation of the Defendants) and I were arbitrating the cause before the authority, and the said *Trimbuk-jee*, by making the arrangements of the *darbar* (meaning by bribing the authority) did not allow the said arbitration to go on fairly; I then took leave of the *Soobadar*, and

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returned back. I had the management of the *isafut* (service-tenure) village *Belgam* in the said division, and about (15) fifteen *beegas* of land in lieu of the *enam* (gift) land of the said village, and the Defendants were in the habit of paying the dues of the *isafut* village to Government, though the same being however in my possession, because the Defendants had the said *enam* land; and consequently, in lieu of the moiety of my share therein, they paid the dues to Government, on the said *isafut* village on my behalf. Thus, in consequence of my right to the said estate, I hold possession of the said *isafut* village and the said land; but leaving the same, I with my family went and resided in another country, under a foreign government; consequently the said *isafut* village fell waste in a short time; and as it was customary under the *Peishwa's* government to farm the revenue of the same annually, so, after collecting the revenue of the other villages, the deficiency of this was paid by them (Defendants), because it belonged to our hereditary estate, and thus the revenue of the village was completed, and the payments were made to the farmer. Afterwards in the year *Saka* 1735, (1813-14, A.D.) I made a determination to have a personal conference with the authorities through the means of one *Chimna-jee Sewdew*, who was a *Karkoon* (transacter of business) of the *Sooba*, and was then present at the *mahals* of *Khidool* on business; and accordingly I met the said *Karkoon*, who took in writing the circumstances of my affairs, and forwarded the same to the *Sooba*, and afterwards I went and had a personal conference with the said *Sooba*. At that time *Trimbuk-jee Sooria Row*, the Defendant, was carrying on the business of the Court, and of the whole of the inherited property, and there-

fore the *Soobadar* of *Junere* caused the parties to be summoned and brought before him, and after examining the genealogical table of my family, and on seeing the letter addressed to me by *Trimbuk-jee Sooria Row*, as well as after taking into consideration the whole of the circumstances of mine and the Defendant's affairs; and on finding that I was the legal proprietor of the moiety of the hereditary estate, the said *Soobadar* made a decision to the following effect, viz., that the moiety of the said estate should be given to *Chand-jee Sooria Row*, and after passing such a decision gave me the *sumud* (patent) bearing date the Arabic year 1214, corresponding with the year A.D. 1813-14; and also the said Defendant *Trimbuk-jee Sooria Row* passed a writing under his own hand to the following effect: 'that of the management of the estate, which had been conducted by him up to the present time, now in consequence of the decision of the authority, a moiety of the same was given over to me, and that the management of the moiety of the said estate should thenceforth be conducted by me uninterruptedly.' On the execution of such a patent from the authority, and such a letter, I returned to the *Concan*, and went to bring my family, who were then residing afar off; and on bringing my family I settled in the village *Belgam*, and prepared to take the management of the hereditary estate. The year after the partition, there was then one *Pursaram Khundi Row*, Collector, *Mamlutdar* (officer in charge of the revenue of the district) of the said talook *Junere*, to whom the nephew of *Trimbuk-jee Sooria Row*, by name *Jai Ram Row*, the Defendant, gave some secret information, which caused me to be apprehended and carried to the fort of *Coonjur Gurh*, where I was kept

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a prisoner for six months. Afterwards a balance was found due to Government by the said *Trimbuk-jee Row*, and for that reason he was dismissed from the office of the manager of the hereditary estate, which was given to *Dessaye Row*, and at that time I was released from my imprisonment by the authority, and resumed by demands on the said *Dessaye Row* for the half share of the said hereditary estate; in consequence of which, out of the land held in *enam*, twenty *beegas* and three quarters *pand** of land was given to me, together with the *isafut* village, and I began to take the management of the same, notwithstanding that I was continually demanding my share of the whole estate, according to the *sunud* of the authority, and to the tenor of the said letter from the said *Trimbuk-jee Sooria Row*. At this stage of the proceeding, the authority of the British Government being established, the said *Trimbuk-jee Sooria Row* departed this life; and the said *Jewa-jee Row* and *Dessaye Row*, the Defendants, have up to this day conducted the business of the hereditary estate."

On the 15th day of *October* 1829, the eighteen Defendants, namely, those who were in possession of the whole of the property in question, except the toll levied at the lesser *talghat*, put in their separate answer to the above *Plaint*, which contained in substance a general denial of the Plaintiff's title. They admitted, however, the letter of *Trimbuk-jee Sooria Row* and the *sunud* of the *Soobadar*, in the year 1813-14, which the Plaintiff relied upon in his *Plaint* as manifesting and establishing his title; but, in order to avoid the effect of these documents, the Defendants alleged, that in the time of the *Peishwa's* government the Plaintiff

* A measure of land, twenty *pands* being equal to one *beega*.

was an outlaw, and had been engaged in the commission of various acts of violence and depredation, and that the government being desirous of securing the person of the Plaintiff, (who it was admitted then claimed a half-share of the estate in question) procured *Trimbuk-jee* to write the above-mentioned letter, and also gave to the Plaintiff the *sunud* stated in the Plaint, by way of inducement to him to come in and place himself within reach of the powers of the Government. An objection was also taken by them to the Plaint, on the ground of multifariousness.

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The remaining three Defendants, *Mahadew Row*, *Gunga-jee Row*, and *Govind Row*, by their answer, denied the accuracy of the Plaintiff's statements relative to his pedigree, and alleged that *Tooka-jee*, the elder of the two sons of *Cano-jee Sooria Row*, the founder of the family, had no issue; and that *Bhica-jee*, the other son, had the following issue: the elder *Chand-jee*, the second, *Mal-jee*, and the youngest, *Haba-jee*; that of the descendants of these three persons there were three families, shareholders of the estate, as follows: 1st. The eighteen Defendants, as the heirs of the elder son, *Chand-jee*, were entitled to one share. 2nd. The Plaintiff, as the heir of the second, *Mal-jee*, was entitled to another share; and 3rd. That they, the three Defendants, as the heirs of the youngest, *Haba-jee*, were entitled to the remaining share of the estate. They insisted consequently that the whole of the estate should be parcelled out according to this threefold division.

Between the Plaintiff and these three Defendants, there was, therefore, no subject of contest, except as to the amount of the share to which the Plaintiff was entitled, of the estate attached to the *deshmookship*.

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The Plaintiff filed his reply to the answers of the Defendants, who afterwards rejoined.

The Plaintiff produced and proved in evidence a *sunud* from the *Soobadar* of *Junere*, dated 1814-15, addressed to *Trimbuk-jee Sooria Row*, whereby it was stated, that, in the Arabic year 1215, the Plaintiff repaired to *Poona*, and represented that, in consequence of a dispute between him and *Trimbuk-jee* respecting the half-share of the estate of the *deshmookship*, he deserted the country for three years; and that, subsequently, *Trimbuk-jee* gave a letter with a guarantee of zemindars of eleven villages, that the management of the half-share of the said estate should be conducted by him, and that consequently he returned to town; since which one year had passed, but the half-share had not been made over, nor the management allowed to be conducted by him; it was therefore directed that, according to the said letter, the Plaintiff should be allowed to continue the management of the same. The letter of *Trimbuk-jee* (one of the eighteen Defendants, and the party actually conducting the management of the estate), which was referred to in the before-mentioned *sunud*, was also produced and proved by the Plaintiff. It was dated 1813-14, and was addressed to the Plaintiff. The letter stated that there was a dispute between the parties respecting their brothership and proprietorship of the hereditary estate; whereupon the papers of the Plaintiff came before the *Sooba*, and an order was issued to make a partition of one half-share; that although the management of the whole of the estate had been conducted by the eighteen Defendants, yet then, by an order of the authority, a moiety of it was given to the Plaintiff, and that by virtue of that writing he should freely manage

the same. The Plaintiff also produced and proved another *sunud* from the *Soobadar*, addressed to the Plaintiff himself, in which the *Soobadar* acknowledged a letter previously sent by the Plaintiff, with a memorandum of his pedigree, and a copy of a letter formerly written to him by *Trimbuk-jee*, respecting the partition of the hereditary estate; and it was stated, that all the circumstances had been taken into consideration, and that a separate letter had been sent to the Plaintiff's address, causing *Trimbuk-jee* to give the Plaintiff a half-share of the said estate, and according to which he should manage the same.

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The Plaintiff also examined witnesses, from whose testimony it appeared that the Plaintiff and the Defendants were of one family; that no partition of the hereditary estate had taken place; and that from the time of the *Peishwa's* government, the Plaintiff had been continually prosecuting his claims, and that the twenty *beegas* of land which was given by the Defendants to the Plaintiff was part of the *enam* land, and that the Plaintiff conducted the management of the village *Belgam* which was held in *isafut*; that for the last twenty-five or thirty years the Plaintiff had been disputing with the Defendants, but they had not given him the share in question.

The Defendants put in several mutilated and imperfect documents, which purported to be *sunuds* for quieting the possession of the *pergunnas* and villages in question. They also produced some letters, and examined two witnesses.

On the 14th of June 1830, Mr. J. H. Farquharson, the first assistant Collector of the *Zilla* of the Northern *Concan*, made his decree, observing:—"That the eighteen Defendants having retained possession of

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the whole of the said estate for upwards of thirty years, and the three Defendants having had the enjoyment of the village of *Ecklere*, and of the toll of the lesser *talghat*, and the Plaintiff having the enjoyment of the village of *Belgam* and twenty *beegas* of the *enam* land (regarding the said twenty *beegas* of land, however, the Court could not give any order),—in this manner the Plaintiff and the said Defendants had the enjoyment, and, according to that, they must continue to hold the land ;” and dismissed the suit, with costs.

From this decree *Chand-jee*, the original Plaintiff, appealed to the Court of the principal Collector of the *Zilla* of the Northern *Concan*, but died before any decree was made by that Court, leaving the Respondents *Trimbuk-jee* and *Jago-jee* his sons, who were afterwards permitted to prosecute the appeal.

On the 5th of *September* 1832, the principal Collector of the *Zilla* of the Northern *Concan* made his decree, which, after recapitulating the circumstances of the case, and the judgment of the assistant Collector, dismissed the appeal, with costs, accompanied with the following observations:—“The Court understand, that it was the custom for the *Soobadars* of the late government to write letters to persons disturbing the peace of the country, in such an insinuating style as would entice them to come in; and the Court is of opinion that the original Plaintiff may in like manner have received the letter from *Trimbuk-jee*. It does not appear to the Court that any of the above letters were obtained by the parties in consequence of an arbitration or any decision, but procured in the manner above-mentioned. The Court is therefore of opinion, that the document (the *sumud*), within the limitation

of time provided for by the Regulation, agreeably to the Appellants' statement, is inapplicable. It appears also, that the Respondents and their ancestors have enjoyed the hereditary estate up to this day; it has not been established in any way that the Appellants or their ancestors have ever either conducted the management of the hereditary estate or received the privileges according to their share, and it is therefore just to disallow the Appellants' claims."

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From this decree the present Respondents presented, and were allowed to prosecute, a Special Appeal to the *Sudder Dewanny Adawlut* of Bombay, and on the 18th of April 1835, the Acting Second Judge, *J. Kentish*, adverting to the view taken by the Collector, of the *sunud* of the *Soobadar*, recorded it as his opinion, That whatever might have been the motives for framing that *sunud*, it was clear that the claim was agitated by the original Plaintiff; that the measures said to have been adopted, however illegal, under a settled Government, nevertheless clearly demonstrated that every effort was urged to recover the rights sued for, and that under the then existing rule of the country, arbitration was out of the question. The Judge was, therefore, of opinion that the Courts had merely to satisfy themselves that the Plaintiff did attempt to recover his rights; that the *sunuds* established that fact, and that the manner and form of procedure was immaterial, provided the demand was made; that the claim was merely disputed on the grounds of the right having been so long in abeyance; that the Plaintiff therefore possessed the rights, and had not forfeited them, inasmuch as the *sunuds* securing them to him proved that the demand was made within the prescribed time. The Judge therefore

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recommended a reversal of the previous decrees, and referred the suit to the decision of a full Court.

This opinion of the Acting Second Judge afterwards received the sanction of the Court, and on the 5th day of *May* 1835, the *Sudder Dewanny Adawlut*, by its decree, reversed the decision of the assistant and principal Collectors, and made an order in favour of the present Respondents, in the terms of the original claim of the deceased Plaintiff.

From this decree the Appellants appealed to His late Majesty in Council.

The eighteen first Appellants submitted that the decree was erroneous for the following reasons:—

I.—Because the suit ought originally to have been dismissed for multifariousness, the present Appellants being sued together with the three other Appellants, *Mahadew Row*, *Gunga-jee Row*, and *Govind Row*, against whom separate and distinct claims were brought, and with whom they were in nowise jointly interested.

II.—Because the Respondents could make no case whatever against these Appellants until they had adduced satisfactory evidence of such relationship as entitled them to the share of the inheritance claimed, which they have wholly failed to do.

III.—Because, even if the Respondents had proved such relationship, the claim set up in this suit was absolutely barred by the limitations contained in Regulation V. 1827.

IV.—Because the decree of the *Sudder* Court proceeded upon an assumption altogether erroneous, viz. That the relationship and right of participation in the inheritance was admitted, and that the institution of the suit within the period of limitation was the only question in dispute between the parties, whereas the

Appellants in their pleadings and evidence, both before the principal and assistant Collector, had expressly put that point in issue.

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The other three Appellants relied on the following reasons :—

I.—Because the claim of the Respondents to a moiety of the inheritance wholly depended on the adoption of *Mal-jee* by *Tooka-jee*, and because no evidence had been given of such adoption.

II.—Because the decree of the *Sudder Dewanny Adawlut* proceeded on the assumption, that these Appellants had admitted the title of the Respondents to the moiety, if the same was not barred by lapse of time, whereas no such admission was ever made, and, on the contrary, these Appellants uniformly denied the title of the Respondents to such moiety.

III.—Because if the Respondents had been entitled to any decree as against these Appellants, such decree could not have been for more than a share of the inheritance equal to one-third thereof, after the portions in the possession of the elder *Chand-jee* and *Mal-jee* branches were brought in, and equally divided.

IV.—Because these Appellants are the representatives of the *Haba-jee* branch, and as such are entitled to one-third of the entire estate of *Cano-jee*; and because they have not been, and are not, in possession of property equal to one-third thereof.

V.—Because if the entire inheritance held by the several branches of the family was not properly the subject of partition in this suit, yet the Respondents could be entitled only to so much of any surplus of the inheritance found in the possession of the *Haba-jee* branch, beyond their equal third part of the entire

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inheritance, as would be sufficient to give to the Respondents an equal third share of the same.

The Respondents relied on the following reasons :—

I.—Because with reference to the circumstances of the case, the suit was brought within the period of limitation prescribed by Regulation V. of 1827.

II.—Because the claim of the Plaintiff to one-half share of the estate in question was fully established by the proofs and admissions in the cause.

Mr. *Burge*, Q. C., and Mr. *Edmund F. Moore*, for the eighteen first Appellants.

Mr. *L. Wigram*, Q.C., and Mr. *Jackson*, for the three other Appellants ; and

Mr. *E. J. Lloyd* and Mr. *Charles Buller*, jun., for the Respondents.

The Respondents' Counsel objected to the Appellants' cases being argued by two Counsel for each set of Appellants ; but their Lordships, under the circumstances of the hostile interests of the separate Appellants, overruled the objection ; and allowed separate replies, giving the Counsel for the eighteen Appellants the right of the last reply.

LORD CAMPBELL :

In this case their Lordships cannot take the same view of the subject that has been taken by the Courts below ; and they regret that the Judges below did not look a little more accurately into the pleadings, to see what questions were to be determined, and to the language of the Regulations of *Bombay*, by which one of the questions was to be decided.

Their Lordships are of opinion that it lay upon the

Plaintiff below to show that he was entitled to one-half of the family property ; which he could only do by evidence of adoption. Now the only evidence of adoption that is brought forward is the *sunud*, and that is represented as a judgment of a court of competent jurisdiction. But their Lordships are of opinion that it cannot be so considered, because it was an intimation to one party that there should be a judgment in his favour ; whereas there was an intimation by the same authority to the other party that the cause remained undecided ; and that when the particular object was gained which was in view when this *sunud* was granted, then the *Sudder* Court would proceed, and there should be an adjudication between the parties. This came from the same authority. We cannot, therefore, consider that it was a judgment, binding and conclusive upon the parties.

Nor is there any admission here, by which the right of the Plaintiff to one-half can be considered as established, because, even supposing that the person by whom the admission was given could represent the other party, he made the admission, under the authority of the Government, for a particular purpose ; and neither himself, nor those whom he represented, can be considered as bound by it. There appears, therefore, to be no evidence of adoption, and therefore no evidence that *Chand-jee*, the original Plaintiff, was entitled to one-half of the family property.

The next question which arises is with regard to the Regulation of Limitations ; and their Lordships are of opinion, that although the *sunud* is not to be considered as a judgment binding between the parties, yet that, taken with reference to the other documents connected with it, it is sufficient to bring the case within the

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exception that has been relied upon ; for it shows sufficiently that there had been a claim preferred to an authority that had a right to try and to decide the question—because we must consider that the Court to which this application was made was then the Supreme power in the State, and had authority to decide between the parties.

It is objected, however, that another condition is not complied with, namely, that there is not sufficient proof of how it was that a satisfactory and a binding decree was not obtained. But we think, that although the *sunud* cannot be considered *per se*, as a binding and regular judgment, it is enough, coupled with the admissions that were afterwards given, to account for the party not having proceeded to obtain the judgment of the Court itself, particularly, coupled with this fact, that he was admitted into occupation of part of the property.

Under these circumstances, their Lordships are of opinion, that the justice of the case will be best satisfied, by recommending to Her Majesty, to remit the cause to the Court below, the *Sudder* Court, with instructions to divide the whole of the property in equal third parts. *Chand-jee* had an opportunity of showing that he was entitled to one half—his attention was repeatedly called to that point—he was warned that it was necessary to prove the adoption. He has failed in doing so. It is admitted that there would be great difficulty now in bringing any further evidence. At all events he has had the opportunity, and has not availed himself of that opportunity. Their Lordships are, therefore, of opinion that he, and those who represent him, must be content with one third of the property. Then the three Appellants will take the

second third ; and the eighteen will take the other third.

With regard to the costs, as the three parties represented by Mr. *Wigram* were from the beginning perfectly willing that the estate should be divided, upon the footing of each having a third, their Lordships think there ought to have been a decree in their favour in the first instance. Their Lordships are of opinion, therefore, that the costs of those parties below ought to be paid according to the course which has been pursued upon these appeals ; and that their costs of this appeal ought to be paid by the Respondents. The costs, therefore, of the three Appellants, both of the proceedings below and of the Appeal, will be paid by the Respondents. The other parties will pay their own costs.

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SYUD ABBAS ALI KHAN - - - - - Appellant,

AND

YADEEM RAMY REDDY - - - - - Respondent.*

*On Appeal from the Sudder Dewanny Adawlut of
Madras.*

*Evidence—Suit on lost bond—Secondary evidence—Admissibility—Burden
of proof of loss or destruction of original.*

Debt on bond. The Defendant by his answer denied his execution of the bond. The Plaintiff, in his reply, stated the accidental destruction of the bond, and prayed leave to put in evidence a registered copy thereof, which the Court allowed, and, at the same time, ordered the fragments of the original to be produced. At the trial the Plaintiff produced the fragments, and, under sec. 11, *Madras Reg. XVII.* of 1802, put in as evidence as registered copy of the bond. He called no witnesses to prove that the fragments produced, formed part of the original bond. The Court admitted the registered copy as evidence, and found for the Plaintiff. The Judicial Committee of the Privy Council, on Appeal, reversed this finding, on the ground that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence.

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THIS was an action brought by the Respondent against the Appellant, on the 17th of *October* 1819, in the *Zilla* Court of *Nellore*, to recover 200 *pagodas*, the first instalment due in respect of the principal sum of 2,346 *pagodas*, together with 281½ *pagodas*, the amount of interest on the above-mentioned principal sum, secured by a bond alleged to have been executed by the Appellant in the Respondent's favour, on the 14th of *February* 1818. The Appellant, by his answer to the plaint, denied that he had ever had any dealings with the Respondent, or that he had ever executed the bond declared upon. The Respondent, in reply, insisted that the bond was duly executed by the Appellant, but stated that, since the institution of the suit, the original bond had been accidentally destroyed by rats; and prayed that the Court would admit a copy from the

* Present: Members of the *Judicial Committee*,—The Lord President, Lord Brougham, the Vice Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—Sir Edward Hyde East, Sir Alexander Johnston, and Sir Edward Ryan.

Registry book, pursuant to the provisions of sec. 11, Reg. XVII. of 1802.

The *Zilla* Court of *Nellore* granted the application ; and by an order of the 23rd of *November* 1819, ordered that the Plaintiff's pleader should produce the fragments of the bond destroyed by rats, as mentioned in the reply, and copies of the register of the bond, which were produced and lodged in Court.

In support of his claim, the Respondent filed an official copy from the registry, of a *vakalutnamā*, or power of attorney, alleged to have been executed by the Appellant to his *vakēel*, to get the bond in question registered; an office copy of the bond from the registry-book; together with the fragments of the original bond. He also examined witnesses, two of whom stated themselves to be subscribing witnesses to the original instruments; but no further evidence was given of the destruction of the bond.

The Court having admitted the office copy of the registered bond in evidence, found for the Plaintiff for the amount sued for.

From this decree, the Appellant appealed to the Provincial Court for the Northern Division of *Madras*; and on the 15th of *August* 1826, *N. Webb*, Esq., the First Judge of that Court, delivered in his draft decree, wherein he expressed, that in his opinion the decision of the *Zilla* Judge of *Nellore* ought to be affirmed, and the appeal dismissed with costs. On the 21st instant, *R. Lord*, Esq., the Second Judge, recorded his dissent from this opinion; and in the absence of the Third Judge, who was on the circuit, the appeal stood over till his return. The Third Judge (*J. C. Todd*, Esq.) concurred with Mr. *Lord*; and the Court being divided, the Second and Third Judges, in conformity

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with sec. 11, Reg. XV. 1802, on the 4th of *October* 1826, pronounced their decree, reversing the decision of the *Zilla* Court, and dismissed the suit with costs.

From this decree the present Respondent appealed to the *Sudder Adawlut* of *Madras*.

The *Sudder Adawlut* being of opinion that further evidence was necessary to enable them to come to a just determination of the suit, directed the record to be sent back, and that the Provincial Court for the Northern Division should be by precept required to instruct the *Zilla* Court of *Nellore*, to call upon the Plaintiff to produce further evidence in support of his averments, with liberty to the Defendant to disprove the same.

Additional evidence was accordingly produced to prove the dealings between the parties and the due execution of the instrument; and the record, together with the transcript of the additional evidence, having been transmitted to the *Sudder Adawlut* of *Madras*, that Court, on the 20th of *July* 1831, pronounced their decree, in which, after stating the circumstances of the case, they proceeded as follows:—"The original of the bond, which is the subject of the present action, has been destroyed, as the Plaintiff averred, by accident; and the first question for consideration is, whether the copy taken from the register of the *Zilla* Court ought to have been received in evidence under sec. 11, Reg. XVII. of 1802, which provides, 'that such copies, in the event of the originals being lost, destroyed or not forthcoming, shall be received as sufficient evidence of such deeds in all Courts of justice whatever, proof being made by the subscribing witnesses to the original deed, that the original was duly executed.' The Plaintiff produced in the *Zilla*

Court what he alleged were the fragments of the original bond which had been accidentally destroyed by vermin in the interval between the institution of the suit and the filing of his reply, and their appearance did not excite any suspicion. The fragments, however, on being examined by the Provincial Court, are stated to have betrayed the evident use of scissors, and to contain words, sums and dates not to be discovered in the copy of the bond filed of record. Now, even on the supposition that the original, for whatever cause, had been wilfully destroyed by the Plaintiff, it is impossible to believe for a moment that care would not have been taken to give to the fragments the appearance at least of the original having been reduced to that state by vermin; or on the supposition that the fragments produced were not those of the bond in question, that care would have been taken to allow no word, sum or date to remain legible, which did not appear in the bond of which they were alleged to be the fragments. Even supposing that the Plaintiff was stupid enough, or had the effrontery, to produce as fragments of a bond destroyed by vermin, scraps of paper which, on the very face of them, betrayed the evident use of scissors, it seems incredible that the imposition should have escaped immediate detection; and the Court think it must be inferred, there must have been some remissness in the custody of these papers, between their first production in the *Zilla* Court, and the examination of the record by the Provincial Court, and that advantage was taken of it to give to the fragments now in the record, the suspicious appearance which they bear. This could only have been done to serve the cause of the Defendant, by throwing discredit upon the best, if not the only

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proof which the Plaintiff could produce of the accidental destruction of the bond; and the Court, under all the circumstances, are satisfied that a sufficient foundation was laid for the admission of the copy in evidence." The decree then proceeded to declare that the bond was properly registered, and that it was clear, from the documentary evidence filed in the cause, that there had been dealings and agricultural transactions between the parties previous to the execution of the bond, and that, in respect to the execution of the bond, the Court did not entertain the least doubt. And the *Sudder* Court accordingly set aside the decree of the Provincial Court, and adjudged the present Appellant to pay to the Respondent the amount claimed, being R. 1,853. 12. 3., together with interest at twelve per cent. per annum, on the principal sum of R. 770, from the date on which the plaint was filed, up to the date of the decree, with all costs of suit.

From this decree the present appeal was brought.

Mr. *L. Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

The main question is, whether the registered copy of the alleged mortgage bond was properly received in evidence. This divides itself into two heads of objection:—first; there is no evidence of the loss or destruction of the bond, nor even of the circumstances in connection with which the bond is alleged to have been lost. Secondary evidence was not admissible without proof of the destruction or loss of the original instrument; and no such evidence was given by the Respondent as could justify the admission of secondary proof. Moreover, the appearance of the fragments produced, disproved

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the allegation of their having been destroyed by rats, or of being even fragments of the bond in question. [Vice-Chancellor KNIGHT BRUCE.—The material evidence was the bond itself ; failing that, evidence should have been given of its destruction. Sccondary evidence can only be received, when the absence of the bond is accounted for.] The *onus* lay upon the Plaintiff to prove its absence or destruction, which they failed to do, or even to identify the fragments as forming part of the alleged bond. [Lord BROUGHAM.—It is not upon the fragments the case rests, but upon the requiring of secondary evidence. The fragments did not open the door to secondary evidence. The Judge seems to have assumed, without evidence, that these scraps were portions of the bond; and these scraps, it appears, do not agree with the description on the Registry. It is exactly as if this were to take place at Nisi Prius; an action upon a bond, and the Plaintiff produces, from an attorney's office, the draft from which these fragments were copied; to let in this draft, the first thing would be to prove that the fragments were the bond declared upon, and put in suit, and then if there appeared a discrepancy between the fragments produced, and the draft, that would be fatal; he would be nonsuited in two moments.] Secondly, the registration of the alleged bond in question was irregular and invalid, according to cl. 2, sec. 9, Reg. XVII. of 1802, for want of the oath required by the Regulation, for neither the Appellant nor any authorized representative, competent to prove the execution, attended at the Registry office.

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Their Lordships here stopped the Appellant's counsel, and called upon the Respondent's counsel, to argue

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Mr. *Burge*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

The difficulty which the Respondent labours under, in the deficiency of the proof of the destruction of the bond, is owing to the limit which has been put upon his proof by the *Zilla* Judge. The Court acted under the provisions of cl. 3, sec. 10, Reg. XV. 1816, which enacts that the Court shall consider and record the point or points to be established, and shall proceed to take the evidence that may be adduced upon such point. The Court, in this case, acting under that Regulation, confines the Respondent simply to produce the fragments. In effect, the Court says, do not bring forward evidence to prove the fact of destruction, but bring forward the fragments of the original bond. In considering this strict and technical objection to the admission of the registered copy, now urged for the first time, it should be remembered that the natives of *India* are ignorant of the mode and technical forms of procedure; and this Regulation calls upon the Court to do that which no other Court in the world does,—to point out what the parties are to confine their proof to. If there is a defect of proof of the loss or destruction of the original bond, so as to admit the registered copy as secondary evidence, the cause can be remitted to the *Zilla* Court, to enable the Respondent to produce evidence of the loss, which he was only prevented from doing by the order of the Court. It would be a great hardship, and operate as a denial of justice, if he is now to

suffer for that which was no negligence on his part. It was the duty of the Judge, under sec. 10, Reg. XV. of 1816, to have called for the requisite evidence.

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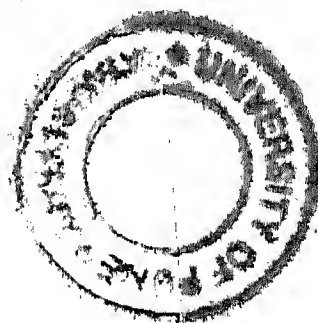
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Lord BROUGHAM:

For the reasons which have been repeatedly thrown out by their Lordships in the course of the argument, and which led to our stopping Mr. *Wigram* for the Appellant, and calling upon the other side, their Lordships are clearly of opinion that this decree of the *Sudder* Court cannot stand, and the only question remaining for our consideration has been that which the counsel for the Respondent threw out for our consideration, and which we took up in the course of the Respondent's argument, whether we ought to reverse the decree at once, though without costs (either below or here, of course), or send it back to enable further inquiry. We have considered the matter in all its lights, and we have come to the opinion that we ought not to send the matter back. Therefore the causes will be retained, and the decree below reversed, without costs, dismissing the Appellant below without costs, leaving the causes exactly as they lay when brought into the Court below.



AGA KURBOOLIE MAHOMED and Others, *Appellants*,
AND

THE QUEEN on the prosecution of MA- }
HOMED KULI MIRZA - - - - - } *Respondent*.*

On Appeal from the Supreme Court of Calcutta.

Heard *ex parte*.

*Trespass—Officer executing civil warrant gaining access by outer door—
Expulsion of, before making arrest—If entitled to break open outer
door which was subsequently locked—Leave to re-enter if to be demand-
ed—Misdirection—Conviction based on—Sustainability.*

A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance by the outer door, but before he could make an actual arrest, was forcibly expelled from the house, and the outer door fastened against him. The officer obtained assistance, broke open the outer door, and made the arrest. *Held* that the officer was justified in so doing.

Held also, that demand of re-entry, under such circumstances, was not requisite to justify his breaking open the outer door.

Quaere. If indictment for assault and false imprisonment will, under such circumstances, lie against the sheriff's officer.

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INDICTMENT at the Criminal Sessions held at *Calcutta* in 1841. The indictment contained three counts. The first count charged the Appellants with having assaulted and beat the prosecutor; the second, that they assaulted and imprisoned him; the third with an assault and battery in the common form. Plea, not guilty.

At the trial it appeared in evidence that one of the Defendants, *Mirza Allu Aukbur* (one of the Appellants), had brought an action, which was then pending in the Supreme Court, against the prosecutor, *Mahomed Kuli Mirza*, and had sued out and delivered to the sheriff of *Calcutta* a *capias ad respondendum*, for the purpose of arresting and holding the prosecutor to bail in that action. The sheriff's warrant was deli-

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Campbell, the Vice-Chancellor Knight Bruce, and The Right Hon. Dr. Lushington.

Privy Councillor,—Assessor,—Sir Edward Ryan.

vered to one *Board*, for the purpose of arresting the prosecutor under the writ, and notice was given on the same day to the prosecutor, by the Plaintiff in the action, that he would be arrested on that day at his suit. The sheriff's officer and assistant, in the afternoon of the same day, went to the prosecutor's house for the purpose of arresting him under the writ. Upon their arrival, they found the outer door open, and entered; but before the officer could make an actual arrest of the prosecutor, he and his assistants were expelled from the house, and the outer door immediately closed and fastened. Upon the officer being so expelled, he sent to a police station for some police officers, and the outer door was by his authority broken open. It appeared that during the time the door was being broken open, the prosecutor fired a pistol twice or thrice from his house, apparently at the persons engaged in entering, but which he swore at the trial, was loaded with powder only.

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Upon the trial there was conflicting evidence, whether the sheriff's officers had in the first instance, before they were expelled, given express notice to the prosecutor of the purpose for which they entered. Evidence was given to show that the persons in the house, who in aid of the prosecutor expelled the sheriff's officer and his assistants, knew the purpose for which he entered. There was no evidence that the prosecutor demanded to see the warrant, or to know the authority of the sheriff's officer in entering, or that he offered to submit to the arrest. Neither was there any evidence of an express demand of admission before the outer door was broken. The evidence conflicted as to any violence or circumstances of aggravation.

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The Judge (*Sir John Peter Grant*), in his charge to the jury, told them, that the assault and imprisonment were admitted, but justified; that the battery and aggravations of the assault were denied; and that the first question, therefore, for their consideration, was, whether the prosecutor was beaten, and whether the assault committed was attended with the aggravations alleged, or any great aggravations. Having recapitulated the evidence upon these points, the learned judge stated “that the second point to be considered was, under what circumstances the beating, and other aggravations of the assault, and the assault and imprisonment themselves, were committed. That what the jury had to try was not any assault or violence offered to the sheriff’s officer before the door was broken open: that for such violence, if offered, the officer had his remedy by action of damages or indictment, but could not offer it as a defence of an unlawful arrest: that the only question to be tried upon this point was, whether this arrest upon civil process, at the instance of a private individual, was a lawful arrest: that the rule of law is, that a man’s house is his castle, and that the officer cannot justify the breaking an outer door or window to execute civil process at the suit of a subject; and his house is that place which he occupies, having his domicile and ordinary residence there: that, if the door be open, the officer may enter and execute the process upon the person or the goods, as the case may be; but that, if before any execution of the process he be thrust out, and the door shut, this latter act is no more than the owner of the house may well do, *scilicet*, to shut the door of his own house; and this, although he is not ignorant of the purpose of the officer’s coming—for there must be certain and

direct proof that those in the house had notice of the process of the law, to make the act of his thrusting them out, unlawful: that if a man be legally arrested and escape, and take shelter in his own house, the officer, upon fresh suit, may break open doors in order to retake him; but that, in order to justify the proceeding to that extremity, two things are necessary—first, that the person have previously been lawfully arrested; second, that due notice have been given by the officer of his business, and admission demanded and refused: that in order to constitute a lawful arrest, one of two things is necessary—either that the bailiff or his assistant have laid hold of or touched the person meant to be arrested; or that the person, upon being informed of the bailiff's business, has submitted and gone with the bailiff, without resistance or flight; for bare words will not make an arrest, nor will an assault upon the officer, or offer of violence to him, whereby, through intimidation or otherwise, he is prevented from completing his arrest, convert that into a lawful arrest, which is not completed: that without a valid arrest there can be no rescous or escape, and without a rescous there can be no lawful breaking of doors to effect an arrest on civil process at the suit of a subject; but that, if there had been a rescous, and the breaking doors had been lawful, there must have been previous notice duly given, admittance duly demanded and refused. It is no light matter by the law of *England* to violate the sanctity of a man's house."

Upon this direction the Defendants were found guilty. A rule *nisi* was granted in the ensuing term for setting aside the verdict, and having a new trial, upon three grounds—first, that the verdict was against

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This rule was afterwards, on the 29th of *November* 1841, discharged without costs. (Sir *Edward Ryan* dissenting.) The Court at the same time gave leave to the Defendants to appeal to Her Majesty in Council, from its judgment refusing a new trial, upon one ground only, namely, on the ground of the alleged misdirection.*

The Solicitor-General (Sir *William Follett*), and Mr. *Greenwood*, for the Appellant.

The charge of the learned Judge to the jury was a misdirection in law ; and the rule *nisi* for a new trial, upon the ground of such misdirection, ought to have been made absolute, and not discharged. The sheriff's officer was justified, although he had not actually arrested the prosecutor, in breaking open the door and arresting him after he had obtained peaceable entry. The maxim, "that every man's house is his castle," must be qualified. In all cases where the outer door is open, the sheriff may enter the house, and do execution. *Semayne's* case (a). In *White v. Wiltshire* (b), the Court said, though the sheriff cannot break into a house to make an execution by a *fi. fa.*, yet when the door is open, and he enters and is disturbed in his execution by the parties who are within

* As to the power of the Supreme Court to allow or deny Appeals in criminal cases, and to impose terms upon which such Appeals shall be allowed ; see *Bengal Charter of Justice*, 26th March, 1774, sec. 32.

(a) 5 Coke, 91, 4th Res.

(b) Palm. 52. 2 Rolle Rep. 137. Cro. Jac. 555.

the house, he may break into the house and rescue his bailiffs. Here the breaking open of the house was justified, the Plaintiff having occasioned the necessity of it. Having obtained peaceable entrance, the sheriff may afterwards break open the inner door, to execute process. *Lee v. Gansel (a)*, *Lloyd v. Sandilands (b)*, Sir M. Foster's Discourse on Homicide, p. 319. He may even, if once lawfully admitted, break open the outer door, if fastened against him, to get out. *Pugh v. Griffith (c)*. Again, if the Defendant, after being arrested, escape, the sheriff may break open either his own house, or that of a stranger, for the purpose of retaking him. *Anon. (d)*

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The prosecutor had notice of the intended writ, and evidence was given, and not contradicted, to show that the persons in the house, who in aid of the prosecutor expelled the sheriff's officer and his assistants, knew the purpose for which he entered. No proof, it is true, was given of an express demand of re-admission; the circumstances and conduct of the prosecutor prevented that, before the outer door was broken open; but there was evidence from which the jury might have inferred that the prosecutor knew the purpose for which the door was broken, and the authority under which the sheriff and his assistants acted. No express demand and refusal of re-entry was necessary. *Hutchison v. Birch (e)*. *Pews's case (f)*. The circumstances of each case must determine the propriety of demand of re-entry and refusal. *Pugh v. Griffith (g)*.

(a) 1 Cowp. 1. Lofft. 374.

(b) 8 Taunt. 250.

(c) 7 Adol. & El. 827.

(d) 6 Mod. 105. Lofft. 390.

(e) 4 Taunt. 619.

(f) Hale, P. C. 458.

(g) 7 Ad. & El. 827.

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 THE QUEEN. If the breaking open of the outer door was an unlawful act, the arrest under the writ could not be made the subject of an indictment for assault and false imprisonment. Lord *Mansfield*, in *Lee v. Gansel* (a), cited *Semayne's* case (b), as deciding "that breaking open the outer door was a trespass, but that taking away goods under a *fi. fa.* was lawful." Indictment cannot lie: in this case it can only at most render the sheriff's officer liable to an action of trespass. *Hutchison v. Birch*. Bacon's Abr. Execution N. Pasch. 4 Ed. 4 pl. 19, cited 4 Taunt. 624.

Lord CAMPBELL,—

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After stating the nature and facts of the case, proceeded.

It was argued before us on the part of the Appellants, that the learned Judge at the trial ought to have directed the jury that if they believed the evidence for the Defendants, they should find a verdict of acquittal; and three points were made by way of exception to his charge. First, that although the prosecutor had not been arrested before the officer and those acting in his aid were expelled from the house, they were entitled to break open the outer door for the purpose of re-entering and arresting him; secondly, that under the circumstances they were entitled to do so without making any express demand for leave to re-enter; and, thirdly, that even if the breaking of the outer door was unlawful, the arrest under the writ and warrant could not be treated as a trespass, and could not be made the subject of an action or indictment for assault and false imprisonment.

(a) 1 Cowp. 6.

(b) 5 Coke, 91.

Having examined the authorities from *Semayne's* case downwards, their Lordships are clearly of opinion, that the two first points ought to be decided in favour of the Appellants, so that, independently of the third, the judgment of the Court below must be reversed.

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There is no doubt that a man's house being his castle, the ordinary rule is, that the outer door cannot be broken open to execute civil process ; but it is admitted here, that if the prosecutor had been arrested, and had then expelled the Defendants from his house, they might have broken open the outer door to enter and retake him ; and their Lordships think that as they had once been lawfully in the house, and he knew that they were lawfully about to arrest him, and he unlawfully caused them to be expelled for the purpose of preventing them from so doing, he cannot be permitted to take advantage of his own wrong, by thus defeating the process of the law ; and that they had a right to place themselves in the position which they occupied when his unlawful act began. Without an actual arrest, there was no rescous or escape ; but the proposition, that till an actual arrest had taken place, the prosecutor might forcibly expel the officer and those acting in his aid, and lock the outer door, so as to entitle himself to the protection of his castle, cannot be supported. The outer door being open, they were entitled to enter the house under civil process ; and they being lawfully in the house, to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act.

Again, there is no doubt that, generally speaking,

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before an outer door can be broken open, even to execute criminal process, there must be a demand of entry, and a refusal. But to what extent? To inform the owners of the house of the purpose for which the entry is to be made, and to afford him the opportunity of opening the door and personally admitting the parties who are to execute the process of the law. Here the prosecutor, who had just expelled the Defendants from his house, that they might not arrest him, full well knew the purpose for which they returned, and he showed a determined resolution to oppose their admission. While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary. *White v. Wiltshire. Pugh v. Griffith.*

This being so, there was no infraction of the law by the Defendants, and no objection can be made to the regularity of the arrest. Whether supposing the breaking open the outer door and the second entrance into the house to have been illegal, this indictment would have been maintainable, it is not now necessary to determine. From *Cameron v. Lightfoot* (2 W. Bla. Rep. 1190), *Tarlton v. Fisher* (Doug. 671), *Stokes v. White* (1 Cr. Mee. & Ros. 223), and *Newton v. Constable* (2 Ad. & Ell. N. S. 157), it appears that an action of trespass and false imprisonment will not lie at the suit of a person who is arrested under a writ and warrant for debt, when privileged from arrest, by attending as a witness under a subpoena, from which it may be argued that here the prosecutor would be confined to his remedy, either civil or criminal, for

forcibly breaking and entering his dwelling-house, and that the simple arrest cannot be made the subject of an indictment, nor of an action of trespass. On the other hand, it has been determined in *Hodson v. Towner* (B. R. H. T. 1837, *Willmore, Wollaston & Dawson*, 53), that the arrest of a party in his house, after breaking open the outer door, is so far unlawful, that he is entitled to be discharged ; and the arrest of the person under civil process, like seizing goods as a distress for rent, after breaking open the outer door, may be considered a continuation of the trespass. However, it is enough for the present, to say, that from the misdirection of the learned Judge at the trial, with respect to the right to break open the outer door of the prosecutor's house, and the necessity of a previous demand and refusal to be admitted, the conviction cannot stand. Their Lordships can only report to Her Majesty that the rule for a new trial should be made absolute ; but after this intimation of their opinion, they trust that the indictment will not be further prosecuted.

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Note.—It will not be unimportant here to note the distinction between process at the suit of the Crown, and that of an individual. This was recognised in *Burdett v. Abbott* (14 East. 167), *Launock v. Brown* (2 Barn. & Ald. 592), 2 Hale. P. C. 117. The following summary of the law upon this subject, alluded to in the argument, will be found in Sir *Michael Foster's* Discourse on Homicide, pp. 319, 320:—

“The officer cannot justify breaking open an outward door or window in order to execute process in a civil suit ; if he do, he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door is opened to him from within, and he entereth, he may break open inward doors, if he findeth that necessary, in order to execute his process.

“The rule that ‘every man's house is his castle,’ when applied to

arrests in legal process, hath been carried as far as the true principles of political justice will warrant ; perhaps beyond what, in the scale of sound reason and good policy, they will warrant. But this rule is not one of those that will admit of any extension ; it must, therefore, as I have before hinted, be confined to the breach of windows and outward doors, intended for the security of the house against persons from without endeavouring to break in.

“It must likewise be confined to a breach of the house in order to arrest the occupier, or any of his family, who have their domicile, their ordinary domicile, there ; for if a stranger, whose ordinary residence is elsewhere, upon a pursuit taketh refuge in the house of another, this is not his castle, he cannot claim the benefit of sanctuary in it.

“The rule is likewise confined to cases of arrests in the first instance ; for, if a man, being legally arrested (and laying hold of the prisoner, and pronouncing the words of arrest, is in actual arrest), escapes from the officer, and takes shelter, though in his own house, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business, and demanded admission and been refused.

“And let it be remembered, that not only in this, but in every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity.

“The rule already mentioned must also be confined to the case of arrest upon process in civil suits ; for, where a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process, founded on a breach of the peace, the party's own house is no sanctuary for him. Doors may in any of these cases be forced ; the notification, demand and refusal before mentioned having been previously made. In these cases the jealousy with which the law watches over the public tranquillity (a laudable jealousy it is), the principle of political justice, I mean the justice which is due to the community, *ne maleficia remaneant impunita*, all conspire to supersede every pretence of private inconvenience, and oblige us to regard the dwellings of malefactors, when shut against the demands of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion.”

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v.

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HONOMAN DOSS, and JANOKEY
DOSS - - - - - } Respondents.*

On Appeal from the Supreme Court at Calcutta.

Practice—Hindoo Law—Joint family partnership—Suit for accounts after dissolution—Separated sons of deceased partner pleading non-liability—Decree for dissolution and accounts without deciding rights of parties—Legality—Legatee and executor under will not impleaded—Validity of will if can be decided—Jurisdiction—Territorial—Trading and having a business house within—If confers jurisdiction.

Decree for an account of dealings and transactions of a deceased partner in an Hindoo family bank, and for a dissolution of the partnership reversed on the ground that the respective rights of the parties were not sufficiently defined, and declared, and that the decree, under any circumstances, was erroneous, being made without the heir or legal representative of the deceased partner being a party to the suit.

An inhabitant of *Benares*, trading at *Calcutta*, and having a house of business there, held to be subject to the jurisdiction of the Supreme Court.

THIS was an Appeal from the Equity side of the Supreme Court. The Bill was filed by one *Muttychund*, the father of the Respondents, *Bindabun Doss*, and *Brijrutton Doss*, against the Appellants and the Respondents, *Honoman Doss* and *Janokey Doss*, for dissolution of a partnership and for an account, under the following circumstances:—*Gopaul Doss*, an Hindoo banker,

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25th Feb.
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* Present: Members of the *Judicial Committee*,—The Lord President (Lord Wharncliffe), Lord Brougham, Mr. Baron Parke, and the Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt.

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was entitled to a moiety or half share of a certain ancestral banking establishment at *Benares*, which was carried on by himself and other branches of his family, under the style of "*Bhoyaram Gopaul Doss*." This concern had branch and dependant banks at *Nagpore*, and various other places. In the year 1785, *Gopaul Doss* died intestate, leaving four sons, *Gocool Doss*, *Monohur Doss*, *Ramchund*, and *Muttychund*, who became equally entitled to the share of their father in the family bank of *Bhoyaram Gopaul Doss*.

Some time after the death of *Gopaul Doss*, and about the year 1791, the sharers and partners in the bank came to a partial division of their capital, stock, and profits, when the branch and dependant bank at *Nagpore* was allotted in severalty to the heirs and representatives of *Gopaul Doss*, namely, his four sons, who afterwards came to a division of all their own joint property, with the single exception of the *Nagpore* bank. *Gocool Doss* took upon himself the management of this bank, and continued to carry on the same, for the benefit of himself and his co-sharers, under the style of "*Gopaul Doss Bhowanny Doss*," until his death, which happened in the year 1795: *Gocool Doss* left no issue. Upon his death his fourth share in the *Nagpore* bank became, by virtue of a deed of gift, vested in his brother *Muttychund*, by whom, in the year 1797, one-half of such share was given to *Ramchund*.

On the death of *Gocool Doss*, his brother *Ramchund*, the father of the Appellants, became the manager of the *Nagpore* bank, and also of a bank at *Cuttack*, which appeared to have been opened by *Ramchund*. The business of these banks was conducted by *Ramchund*, through the agency of *gomastahs*, for the benefit of himself and his co-sharers, *Muttychund* and *Monohur Doss*.

In the beginning of the year 1797, an agreement was entered into between *Ramchund* and *Muttychund*, with respect to the share in the *Nagpore* bank, which had belonged to their deceased brother, *Gocool Doss*, and on the 10th of *February* in that year an instrument was executed by *Muttychund*, whereby he agreed that the capital and profits of such share should be divided between himself and *Ramchund*, in equal moieties. In consequence of this arrangement, *Muttychund* and *Ramchund* became each entitled to three eighth shares in the *Nagpore* bank, the remaining two eighth shares being the property of *Monohur Doss*.

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In the year 1805-6, the branch or dependant bank at *Cuttack* was finally closed and discontinued, and the accounts of the firm forwarded to and deposited in the superior bank at *Nagpore*.

Ramchund and *Muttychund* both lived at *Benares* during the whole time of *Ramchund*'s management of the banks, from 1795 to 1828.

In the year 1819, *Monohur Doss* died intestate, leaving his only son *Mocundloll* his heir and representative, who thereupon became entitled to the two eighth shares in the bank at *Nagpore* which had previously belonged to his father. *Mocundloll* died in *September* 1823, intestate, leaving a widow named *Tazoo Bohoo*, and three sons, namely, *Ram Doss*, *Janokey Doss*, and *Honoman Doss*, who thereupon became jointly entitled to the two eighth shares of their father, in the *Nagpore* bank and its dependencies.

On the 14th of *June* 1826, the firm of *Muttychund*, which up to that time had been carried on by *Ramchund* at *Calcutta*, was finally closed, and an advertisement to that effect was a few days afterwards published in the *Calcutta Government Gazette*, in the *English*,

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Persian, Bengalee and Nagree languages, and all persons having claims on the *Calcutta* concern were requested to make the same known to *Ramchund* at *Benares*, by whom the same would be adjusted. An announcement was published in like manner, stating that the Appellants, therein described as bankers in the city of *Benares*, had opened a bank in *Calcutta* on the 15th of the same month of *June*, under the name of "*Muttychund gomastah Baboo Janokey Doss and Damoder Doss.*" This bank, it was alleged, was established by the Appellants with their own funds, and on their account, and was not a branch bank, or in any way connected with that at *Nagpore*; and it was insisted that neither *Ramchund* nor any other person but the Appellants had any interest therein. It was also alleged that about this time a banking establishment at *Benares*, under the firm of "*Muddun Gopaul Janokey Doss,*" was established by the Appellants on their own account, and with their own funds, independently of *Ramchund*. The firms of *Brijomohun Doss Ramchund* and the bank at *Nagpore* continued to be conducted by *Ramchund*, the latter until his last illness, and the former up to the time of his death.

In the month of *November* 1827, the Appellants opened a bank at *Benares*, under the style of "*Janokey Doss Damoder Doss.*" *Ramchund*, it was insisted had at no time any control or interest in this establishment.

On the 10th of *January* 1828, *Ramchund* made and executed a Will, whereby, after appointing his brother-in-law, *Baboo Dhurram Doss*, his executor (*vassee*), and bequeathing several pecuniary legacies, principally to the female branches of his own family, he bequeathed the residue of his real and personal

estate to his grandson *Baboo Hurry Doss*, the son of *Janokey Doss*, the Appellant.

The right to make such a Will, as well as its effect and operation, were contested in the suit, but was not affected by the decision on the Appeal.

On the death of *Ramchund*, his brother-in-law and executor *Dhurrum Doss*, took possession of all his real and personal estate, and managed and carried on the business of the firm of "*Brijomohun Doss Ramchund*," for the benefit and on account of the devisee and residuary legatee, *Hurry Doss*, then a minor.

On the 22nd of November 1830, *Muttychund*, the brother of *Ramchund*, and the father of the Respondents, *Bindabun Doss* and *Brijrutton Doss*, filed a bill on the Equity side of the Supreme Court of Judicature at *Fort William* in *Bengal*, against the Appellants, and the Respondents *Honoman Doss* (one of the sons of *Mocundloll*, and grandson of *Monohur Doss*), and also against *Ram Doss*, and *Janokey Doss*, (the other two sons of *Mocundloll*,) when they should respectively come within the jurisdiction, praying that an account might be taken between him, *Muttychund*, and the Appellants, and the sons of *Mocundloll*, of the profits, dealings and transactions of the firm *Gopaul Doss Bhowanny Doss* at *Nagpore*, during the management of *Ramchund*, particularly of all monies, jewels, effects, securities and property belonging thereto, withdrawn or taken out of the bank by *Ramchund*, or by his order, and applied in his own trade, or to his own use, and of all monies, jewels, effects, securities and property, received by him on account of the bank, and not accounted for in his lifetime, and that the Appellants, as co-heirs and representatives in estate of *Ramchund*, might be decreed to

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make good whatever should be found to have been so withdrawn, or received and unaccounted for by him, above his share and proportion in the bank, and that the Appellants might admit assets of *Ramchund*, sufficient to satisfy whatever should be found due, or that an account might be taken of the assets and estate of *Ramchund*, come to the hands of the Appellants, or of either of them, as his sons, heirs and representatives, either by gift in his lifetime, or by bequest or inheritance since his death. The bill also prayed a dissolution of the partnership in the bank of *Gopaul Doss Bhowanny Doss*, and an account of the dealings and transactions thereof, since the death of *Ramchund*, and an apportionment of its property amongst the partners.

The bill was amended before answer, and a prayer was added for an account of the dealings and transactions of the bank of *Petum Doss Juggomohun Doss*, (meaning the dependant or branch bank of *Joomna Doss Petum Doss* at *Cuttack*,) during the management of *Ramchund*. The bill alleged that the Plaintiff *Muttychund* was, and still continued to be, entitled by virtue of the gift from *Gocool Doss* to the whole of the share in the *Nagpore* bank, which had previously belonged to *Gocool Doss*, and which, together with his own share therein, entitled him to one half share in that bank; that the branch bank at *Cuttack* was closed and discontinued by *Ramchund* so late as the year 1823; that *Ramchund* always in his lifetime evaded and delayed coming to any account with his co-partners, of the dealings and transactions of the bank, and that he died without coming to any such account; that on the occasion of taking upon himself the management of the *Nagpore* bank after the death of *Ramchund*, the

Plaintiff *Muttychund* for the first time discovered that *Ramchund* had, during his management thereof, fraudulently and unknown to his co-partners, withdrawn from the stock large sums of money, and several securities, jewels, and effects, of the value of twenty lacs of rupees beyond his share, which he had applied to his own use, and had never accounted for; that for the purpose of concealing his fraudulent acts from his co-sharers, *Ramchund* had caused a great part of the books of account, vouchers, and documents of the *Nagpore* bank, to be removed from that bank into his own charge, and had secreted or destroyed them, and if they had not been destroyed by *Ramchund* in his lifetime, that since his death they had been concealed or destroyed by the Appellants; that the *Nagpore* bank had extensive dealings and transactions, and among others, with the separate banks of *Ramchund* at *Benares* and *Calcutta*, which were continued by these Appellants; that owing to the fraudulent removal of such books, accounts, and vouchers, the Plaintiff, *Muttychund*, was unable to settle or adjust the accounts of the *Nagpore* bank; that the Appellants, as the sons, heirs and representatives in estate of *Ramchund*, were liable, notwithstanding any Will or testamentary disposition by him, to account with the Plaintiff, *Muttychund*, and the other partners, and to make good the monies and effects alleged to have been withdrawn and misapplied by *Ramchund*; that the Appellants, as such sons, heirs, and representatives in estate, had by gift or descent from *Ramchund*, possessed themselves of ample assets to satisfy all such misapplications by him; that if any pretended Will, Deed, or other instrument of *Ramchund*, should be insisted upon as constituting any other person his legal

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representative in estate, the same was fraudulent and inoperative to discharge the liability of the Appellants ; and that by reason of there being no competent Court of Judicature at *Nagpore*, or in the Provinces under the *Bengal* Presidency, the Plaintiff, *Muttychund*, was unable, by any suit at *Nagpore* or *Benares*, to obtain a discovery on oath, or to enforce any account, or a dissolution of the partnership, or to obtain any adequate redress in the matters in question in this suit, and that the Appellants were traders and inhabitants of *Calcutta*, and therefore subject to the jurisdiction of the Supreme Court.

The Appellants put in their answer to the amended bill on the 22nd of *March* 1832, and thereby set forth, among other things, that an agreement had been made by *Baboo Ramchund* and the Plaintiff, *Muttychund*, whereby a moiety of the share of *Gocool Doss* had been transferred by the Plaintiff to *Baboo Ramchund*, and that the branch or dependant bank at *Cuttack* had been closed a long time previous to the year 1823. The Appellants stated that they did not believe that *Ramchund* ever evaded or purposely delayed coming to any account, or that he kept the Plaintiff *Muttychund*, or his other partners, in ignorance of the accounts and transactions of the bank at *Nagpore*, or the branch at *Cuttack*, but that they were unable to state whether at the time of the death of *Ramchund* the accounts of the *Nagpore* bank and of the *Cuttack* branch were or not settled between him and the Plaintiff *Muttychund* and the other partners. They stated that they did not believe that *Ramchund* ever fraudulently or privately withdrew from the said bank any sums of money, securities, jewels, or effects, above his own proportion of the capital and profits thereof, or that he

applied the same to his own use, without accounting with his partners, or that he had caused any part of the books, vouchers, and documents to be removed into his own custody, or ever secreted them. They positively denied that they ever had concealed or destroyed any such books, vouchers, or documents, or that the same had ever been in their charge or custody. They stated that they were unable to answer whether the *Nagpore* bank had had dealings with the separate banks carried on by *Ramchund* in his lifetime at *Benares* and *Calcutta*, but they denied that any such separate banks of *Ramchund*, either at *Calcutta* or *Benares*, had been since his death continued by them; and they denied that by reason of the alleged removal of the books or documents, or the concealment or destruction thereof, the Plaintiff *Muttychund* had been or was unable to settle or adjust the accounts of the bank. They insisted that they, the Appellants, were not the heirs or representatives of *Ramchund* in estate or property, and that they had no right, title, or interest therein. They admitted that by certain deeds of gift, the purport of which, with the dates, &c., they set forth, but not by way of inheritance or representation, they had derived from their father, property to the amount and of the nature and description specified in those deeds. They denied that any of such instruments of gift, or the Will of *Ramchund*, relied upon by them, were fraudulent or inoperative, or that their liability was not thereby discharged unless the banking establishment and other estate of *Ramchund*, which had been transferred or bequeathed to *Hurry Doss*, should prove to be insufficient to answer all lawful claims upon the estate of *Ramchund*. The Appellants submitted, that whether the residuary estate of *Ramchund*, transferred or be-

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queathed to *Hurry Doss*, was sufficient or insufficient to answer all claims upon it, yet the claim of the Plaintiff, *Muttychund*, could not be sustained as against them, inasmuch as the other sharers and partners in the *Nagpore* bank had never interfered in the lifetime of *Ramchund*, and the Appellants had given up considerable claims as heirs, and it was not even alleged that *Ramchund* was not at the time of the execution of such deeds of gift, and at the time of his death, in perfectly good and solvent circumstances: as the Appellants had released all their claims as the heirs of *Ramchund*, and had accepted in lieu thereof the property specified in the deeds of gift, and no claim having been made by the partners of *Ramchund* in respect of the matters in question, until long after his death, the Appellants alleged and insisted that they were purchasers of the property which they had derived from *Ramchund* for a valuable consideration, not only without notice of any claim thereon, but without any charge or just claim upon that property having in fact ever existed. The Appellants said that they believed that the Courts established by the Government in the Presidency were competent to compel and enforce an account of the dealings and transactions of the *Nagpore* bank, and a dissolution and partition thereof, and to give adequate redress in respect of the same; and they submitted as a question of law, whether they, being residents of *Benares*, and traders of and in, but not actual inhabitants of, *Calcutta*, were then, by reason of their carrying on trade within *Calcutta*, subject to the jurisdiction of the Supreme Court.

On the 7th of *August* 1832, the Plaintiff, *Muttychund*, obtained the common order to amend, not requiring a further answer from any of the defendants.

The matters introduced by amendment under this order consisted of certain charges relative to the *jaghire* of *Kurmna* *Barsey* and *Khundalah*, therein mentioned to have been granted to *Ramchund* by the *Raja* of *Nagpore*, and a prayer that the same might be decreed to have been and to be the joint property of the partners in the *Nagpore* bank, and that an account might be taken of the rents and profits thereof during the management of *Ramchund*, and since his death, and that a partition thereof might be made between the partners, and that the title-deeds and muniments thereof might be decreed to be delivered up to the Plaintiff, *Muttychund*, as manager of the bank. The bill charged in effect that *Ramchund* had procured the *jaghire*, which was the joint property of the partners in the *Nagpore* bank, to be transferred into or renewed in his own name, and appropriated to himself the whole rents and profits thereof, for which he had never accounted to his partners, and had possessed himself of the grant and title-deeds, and removed the same to his own bank at *Benares*; that upon the death of *Ramchund*, the Plaintiff, *Muttychund*, entered upon the management of the *Nagpore* bank, and into possession of the property and securities thereof, and of the *jaghire* among the rest, and that by reason of the grant and title-deeds of the *jaghire* having been so removed from the *Nagpore* bank, and of the Plaintiff, *Muttychund*, being unable to produce the same when required, the *jaghire* had been seized and sequestered by the *Raja* of *Nagpore*, and that the partners of the bank were likely to be deprived of the benefit of the same.

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Honoman Doss and *Janokey Doss*, two of the sons of *Mocundloll*, filed their answers, and the cause

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being at issue, witnesses were examined on both sides.

The deeds of gift mentioned by the Appellants in their answer were put in evidence. They purported to be made in consideration of the natural love and affection of *Ramchund* to his children, the Appellants, and made no mention of the property therein described as being received by the Appellants in full satisfaction, or in lieu of their rights as his sons, heirs, and representatives, or of any separation or intended separation between him and the Appellants; it was not shown that the alleged Will had ever been acted on or treated as a valid instrument, and no acts of interference with the property of *Ramchund*, either by *Dhurrum Doss*, *Joomnah Doss*, or *Goberdhone Doss*, were proved. Witnesses were examined, who swore in general terms that all the property of *Ramchund* had been possessed successively by *Dhurrum Doss*, *Joomnah Doss*, and *Goberdhone Doss*, but none of them specified any portion of that property which they knew to have come into the hands or under the control of any of these persons, or any particular act which they knew to have been done by any of those persons, as alleged representatives of *Ramchund*.

The cause came on to be heard before Sir *John Franks* and Sir *John Peter Grant*, on the 7th of *March* 1834, and was heard on that day, and also on the 11th, 12th, 13th, 14th, and 15th days of the said month, on which last day (Sir *John Peter Grant* having declined, on account of his having been counsel in the cause, to take any part in the decision) the judgment was pronounced by Sir *John Franks* alone, who was pleased to order and decree, "that it be referred to the Master to take an account of the *cootee* at *Nagpore* in the plead-

ings mentioned, and of the dependant *cootee* at *Cuttack*, and also of the rents and profits of the *jaghire* called *Kurmnah Barsey* and *Khundalah*, in the evidence of the cause mentioned, from the time that *Ramchund* became the manager of the said *cootees* respectively, up to the time of his death; and from the time last aforesaid to the present time; with a like reference to the Master, to take an account of all sums drawn from the said *cootees*, or an account of the rent, &c., of the said *jaghire*, either by the said *Ramchund* in his lifetime, or the Defendants *Baboo Janokey Doss* and *Damoder Doss* since his death, or the said Complainant, or any other person or persons on their accounts, or any or either of them respectively, or by any other parties to this cause, since the time that the said *Ramchund* became manager of the said *cootees* up to the present time,—any of the parties to the cause to be at liberty to apply for a receiver of the property, &c., of the said *cootees* and of the rents, &c., of the said *jaghire*, if so advised,—and if no such receiver should be applied for or appointed, the said Complainant, as manager aforesaid of the said *cootees*, was declared accountable and should account for the profits and receipts thereof from the time he became manager thereof up to the dissolution thereof, or until the final Decree in the cause:” All equities being reserved.

Copies of the minutes of the above Decree having been obtained by the solicitors of the several parties in the cause, the Complainant, (Respondent’s father,) on the 17th day of *April* 1834, after Sir *John Franks* had resigned, and departed from *India*, obtained an order *nisi* to have the minutes altered and rectified, and the same were accordingly, in the month of *April* 1834, (when the said order was made absolute,) altered by

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Sir *John Peter Grant*, the only remaining Judge, and the Decree was made as follows, viz.:—

The Court doth think fit to order and decree, and it is hereby accordingly ordered and decreed, that the co-partnership in the joint family *cootees* or banking-houses carried on at *Nagpore*, under the name, style and firm of *Gopaul Doss Bhowanny Doss*, and the dependant *cootee* or banking-house carried on at *Cuttack*, under the name, style and firm of *Petum Doss Juggomohun Doss*, in the pleadings of this cause respectively mentioned, be dissolved. And it is further ordered and decreed that it be, and it is hereby referred to *George Money*, Esq., the Master of this Court, to take an account of the dealings and transactions of the *cootee* or banking-house at *Nagpore*, in the pleadings of this cause mentioned, and of the dealings and transactions of the dependant *cootee* or banking-house at *Cuttack*, and also of the rents, issues, and profits of the *jaghire* called *Kurmnaah Barsey* and *Khundalah*, in the evidence of this cause mentioned, from the time that the said *Ramchund* became the manager of the said *cootees* or banking-houses respectively, up to the time of his death, and from the time last aforesaid to the present time, and to the dissolution thereof. And it was further ordered and decreed, that it be referred to the Master to take an account of all sum and sums of money drawn from the said *cootees* or banking-houses, or on account of the rents, issues and profits of the said *jaghire*, called *Kurmnaah Barsey* and *Khundalah*, either by the said *Ramchund* in his lifetime, or by the Defendants *Baboo Janokey Doss* and *Damoder Doss* since his death, or by the said Plaintiff, or any person or persons on their account or behalf, or on the account or behalf of any or either of them respectively, or by

any other parties to this suit, since the time that the said *Ramchund* became the manager of the said *cootees* or banking-houses, up to the present time, and to the dissolution thereof, and that the Master, in taking such account, should make to all parties all just allowances; and for the better clearing of the said account thereby directed to be taken, it was further ordered, that all parties do produce before the Master on oath, all books, accounts, papers and writings, in their or any or either of their hands, custody, power or control, or in the hands or custody of their or any or either of their servants and agents, relating or in any way touching or concerning the matters thereby referred to the said Master; and that the said Master be at liberty to examine the parties, Plaintiff and Defendants, upon interrogatories, or *viva voce*, on oath, and to examine such witnesses on oath as shall for that purpose be produced before him, by any or either of the parties to this suit. And the Court further decreed and declared, that any of the said several parties to this suit should be, and they are hereby at liberty to apply to the Court for a receiver of the monies, property and estate of the said *cootees* or banking-houses, and of the rents, issues and profits of the said *jaghire* called *Kurmnah Barsey* and *Khundalah*, if so advised: and the Court did further decree and declare, that if no receiver should be applied for or appointed, the said Plaintiff, as manager as aforesaid, of the said *cootees* or banking-houses, is accountable, and should account for the profits and receipts thereof, from the time he became manager thereof, up to the dissolution thereof, or until the final Decree to be made by the Court in this cause. And the Court did further order and decree, that the said Master

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should make his report on the several matters thereby referred to him on or before the second Equity day of the third Term 1834. And the Court reserved all further directions, with liberty to apply, &c.

On the 26th of *August* 1834, the present Appellants preferred their petition, praying for leave to appeal to His late Majesty in Council, against the Decree of the 15th of *March* 1834; and an order of the Supreme Court, dated the 6th *September* 1834, allowed the appeal.

On the 4th of *February* 1835, the Respondent's father, *Muttychund*, died intestate, and on the 23rd of *March* 1835, the Respondent and *Bindabun Doss*, his sons, heirs, and legal representatives, filed their Bill of revivor, and the proceedings were duly revived.

On the 7th of *September* 1836, the Appellants filed a petition of re-hearing, and the cause was accordingly re-heard in the Supreme Court, before Sir *Edward Ryan*, Chief Justice, and Sir *John Peter Grant*, and Sir *Benjamin Heath Malkin*, Puisne Justices of the Court, on the 10th, 11th, 12th, and 13th *January* 1837: evidence was read on the re-hearing, which had not been read at the original hearing. And the Court, by a Decree made and pronounced on the 9th of *February* 1837, ordered and decreed that the decretal order made and pronounced in the original cause on the 15th day of *March* 1834, should be, and the same was thereby affirmed. And the petition of re-hearing filed by the Defendants *Baboo Janokey Doss* and *Damoder Doss*, of the 7th day of *September* 1836, was thereby absolutely dismissed. Against this decretal order the present Appeal was brought.

Mr. *Pemberton*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Jackson*, for the Appellants, in support of the Appeal,

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Argued that the suit was not maintainable—the Appellants, being inhabitants of *Benares*, and, therefore, not within the jurisdiction of the Supreme Court at *Calcutta*.—[Their Lordships, however, intimated their opinion, that by trading in *Calcutta*, and having a house of business there, the Appellants were within the jurisdiction of the Supreme Court.]—That the Appellants never possessed or claimed any right to the share of *Ramchund* in the bank at *Nagpore*, or to any part of the real or personal estate possessed by him at the time of his death, and that they were, consequently, not liable to the demand made by the Respondents in their suit, or to any of the debts or liabilities which affected *Ramchund*, at the time of his death. That *Ramchund* having made a valid testamentary disposition, constituting an executor and representative, and disposing specifically of his share in the bank at *Nagpore*, and of the rest of his property, in favour of *Hurry Doss*; the executor and manager, together with *Hurry Doss*, became and were the representatives of the estate of *Ramchund*; and that so far as the suit raised a demand against *Ramchund* and his estate, the executor and *Hurry Doss* were necessary parties to the suit. They cited in support of the power of a Hindoo domiciled in *Benares* to make a Will, the *Mitacshara*, 256, par. 27. 1 *Strange's Hindoo Law*, p. 169. *Mulraz Lachmia v. Chalekany Vencata (a)*, *Bengal Regulations*, XXXVI. of 1793, XXVIII. of 1795, XLIV. of 1795, and V. of 1799.

(a) 2 Moore's Ind. App. Cases, 54.

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Mr. *Russell*, Q. C., and Mr. *Cochrane*, for the Respondents,

Contended, *First*, that in the countries where the *Mitacshara* prevails, no one could exercise individual ownership over any portion of joint property, except for purposes recognized by law; that there must be separation and division to give any power over a joint ancestral estate. *Numdram v. Kashee Pande* (a). *Sheo Surrun Misser v. Sheo Sohail* (b). *Ooman Dutt v. Kunhia Sing* (c). *Sham Singh v. Mussumant Umraotee* (d). *Bhowanny Churn Bunhoojea v. The Heirs of Ramkaunt Bunhoojea* (e). *Secondly*, that in Benares, where the family was domiciled, the *Mitacshara* was the ruling authority. *Daya-bhaga*, p. 4, by *Colebrooke*. *Mayne's*, p. 4, by *Borradaile*. And also at *Bombay*. *Ramkoonwur v. Ummur* (f), by which law, a testamentary disposition was not recognised, and, therefore, could have no validity. 1 *Wm. Macnaghten's Hindoo Law*, 4. 1 *Strange's Hindoo Law*, 266. 2 *Strange's Hindoo Law*, 419, 437. 2 *Colebrooke's Dig.* 516. *Tooljaram Hurjeevun v. Nurbheram* (g). *Gungaram Wissoonnath v. Tappee Bae* (h). *Mussumat Goolab v. Mussumat Phool* (i). *Ichharam Shumbhoodus v. Prumamund* (k). *Hureewulubh Gungaram v. Keshowram Sheodas* (l). *Thirdly*, that, if the alleged Will was to be taken as a deed of gift, it was not merely voidable, but absolutely void. The *Mitacshara*, p. 257, par. 27 ; p. 279, par. 10. *Daya-bhaga*, par. 83, p. 52 ; no possession having been delivered in the lifetime of *Ramchand*. And, *lastly*, that

- (a) 3 Ben. Sud. Dew. Rep. 233.
 (c) 3 Ben. Sud. Dew. Rep. 145.
 (e) 2 Ben. Sud. Dew. Rep. 202.
 (g) 1 Borr. Bom. Sud. Dew. 380.
 (i) 1 Borr. Bom. Sud. Dew. 157.
 (l) 2 Borr. Bom. Sud. Dew. 6.

- (b) 4 Ben. Sud. Dew. Rep. 158.
 (d) 2 Ben. Sud. Dew. Rep. 74.
 (f) 1 Borr. Bom. Sud. Dew. 417.
 (h) 1 Borr. Bom. Sud. Dew. 372.
 (k) 2 Borr. Bom. Sud. Dew. 474.

the decretal order of the Court, ordering the partnership to be dissolved, and directing merely the account of the partnership dealing, was according to the usual practice of the Supreme Court at *Calcutta*. *Clarke's Rules and Orders of the Supreme Court at Calcutta.*

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The Right Hon. Dr. LUSHINGTON:

1st August
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This is an Appeal from the Equity side of the Supreme Court of Judicature of *Bengal*, and the case was fully argued before us some time since. Many questions of great importance and difficulty in Hindoo law were raised and discussed; the evidence also, as to disputed matters of fact, was argued upon at length. The precise ground, however, of the Decree in the Court below, did not satisfactorily appear; this, their Lordships were anxious to ascertain, and for such purpose it was necessary to wait for some time. This circumstance, added to the great complexity of the case, has delayed judgment much longer than is usual in this Court.

The present Appellants are the sons of *Ramchund Doss*, who died on the 7th of *February* 1828—they were the Defendants in the original suit. The Respondents are the sons of *Muttychund Doss*, the original Plaintiff, who died on the 4th of *February* 1835.

Ramchund and *Muttychund* were brothers, the suit, therefore, as relates to those parties, is between first cousins.

The family was originally joint; but it is admitted on behalf of the Respondents, that they became separate in 1795, as to all property, save two *cootees*, a principal *cootee* at *Nagpore*, and a branch *cootee* at *Cuttack*, and also another *cootee* at *Benares*, which is not the subject of this suit.

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Ramchund, the father of the Appellants, managed the Bank at *Nagpore*, till his death ; and the object of the Respondents is to obtain from the Appellants, his sons, an account of all *Ramchund's* dealings with that bank, and to make them responsible. The Respondents allege that the Appellants are the heirs and representatives of *Ramchund*, and, therefore, liable for his acts and debts.

The Appellants say that they are not the representatives, because they became separate from their father in 1823—that by deed of gift they took a part of the property as separate—that the remainder was the separate property of *Ramchund*, who by Will, dated 10th *January* 1828, bequeathed it to *Hurry Doss*, the son of *Janokey Doss*, one of the Appellants, which *Hurry Doss* is out of the jurisdiction of the Court, and no party to these proceedings.

In reply to this defence, the Respondents say, 1st,—That it is not true in fact that the separation of the family took place in 1823.—2nd, That there being no such separation, the deed is void, and they say the whole was a fraud.—3rd, That no Will, under such circumstances, could be legally made, for that there could be no legal Will without a previous separation.—4th, They say that by the Hindoo law, the sons are the heirs and representatives of the deceased, even though he had made and could make a disposition of his estate to other persons ; that, therefore, they are accountable, and that the objection to the want of parties falls to the ground.

This cause originally came before Sir *John Franks*, and on the 15th of *March* 1834 he made a Decree, which in *April* was slightly altered by Sir *John Peter Grant*. By that Decree the co-partnership in the joint

family *cootees*, at *Nagpore* and *Cuttack*, was dissolved, and an account ordered to be taken from the time *Ramchund* became manager till his death, and till the dissolution.

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After this Decree had been pronounced there were other proceedings by Bill of Review, and otherwise, which it is not necessary particularly to take notice of.

The cause was afterwards re-heard by the full Court, and on the 9th of *February* 1837, the Petition for re-hearing was dismissed without costs, and the Decree was affirmed.

We have been enabled to obtain an extract from the minute of Sir *John Peter Grant*, who sat as one of the Judges, and under the date of the 9th of *February* 1837 we find the following note :—"Do not enter into any other question of Hindoo Law, but that *Ramchund* could not deprive *Muttychund* and others, of their right to call upon the sons, the legal representatives of *Ramchund*, for an account."

This appears to be the only ground on which the claim was rested, and the question, therefore, is, whether the proposition of law involved in it, be true and sufficient to sustain it.

Now, as there was no decision as to any of the contested facts in the cause, it may be expedient to try the proposition on the assumption that all the facts were in favour of the Appellants; for if any of the facts in controversy being found in favour of the Appellants would infringe the proposition of Law, it would be right to have in some way previously determined upon them. The alleged facts are,—a separation between *Ramchund* the father, and his two sons the Appellants, in 1823; a gift by him to them of part of his property; a ceder by them of all right to the remainder; a Will by *Ram-*

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chund, in favour of a third party, of all the remainder, consequently that the son had no interest in these *cootees*, they being part of the sole property of *Ramchund*; that they took no benefit under their father's Will; were not, in the English meaning, his representatives, and could not be liable for his debts.

The consequences of that legal proposition are certainly very strong; for granting the legality of the separation and testacy, persons might be made accounting parties and liable for the Testator's debts who took nothing under his Will, and this without making the executor, if there was or could be one, or the residuary legatee, a party.

There is another observation which necessarily occurs, if the Hindoo Law were as stated, and known so to be: it is difficult to understand why there were so many allegations in the Bill, and why such voluminous evidence was entered into on both sides, and that if such were not the generally known and acknowledged law of *India*, we should naturally have expected a more formal judgment on so very important a point.

It is also fit to state, that in the course of these proceedings, issues were asked for on the part of the Appellants to try the validity of the Will and the Deeds.

Again, it must be remembered that the Decree cannot stand unless it be first clearly proved that the Appellants are, if anything should be found due to the Respondents arising from the acts and dealings of *Ramchund*, liable to answer that demand; we cannot make a Decree, ordering them to account, without first determining that they are liable to pay if anything be found due.

A Decree for an account is not, as appears to have been assumed, a mere direction to inquire and report.

It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a Decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting.

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Neither *Hurry Doss*, the residuary legatee in the Will of *Ramchund*, nor the executors, if there be any, are parties to this suit; indeed, *Hurry Doss* is admitted to be out of the jurisdiction of the Court. If the Will be valid (and the Court in acting as they have acted must have taken it for granted that the Will if valid would make no alteration in their Decree)—If the Will be valid, and there be sums due from the estate of *Ramchund* to the Respondents, then of course those demands must be satisfied out of the assets of *Ramchund*, and the person most interested to maintain the validity of the Will and to contest the claims of the Respondents is *Hurry Doss*, who is not a party; and it appears to their Lordships that in the absence of *Hurry Doss* the validity of this Will cannot be tried.

Neither do we think that its invalidity can be assumed as against the present Appellants, especially when we recollect that an issue to try its validity was asked for; assuming the law to be as contended, that the Appellants are the representatives of *Ramchund*, their father, Will or no Will, and as such might in some events be called on to account, yet as the Will may, notwithstanding the Decree, be a valid Will, and as *Hurry Doss* may be in possession, or the executor may be in possession, of the assets of the Testator, certainly they must be considered to be necessary parties to this suit, for if the Will be valid they must be primarily accountable.

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For these reasons we are of opinion that the Court was mistaken in acting upon the presumption that the ordering an account to be taken did not decide the right. We, therefore, reverse the Decree ; but, looking at all the circumstances of the case, we think it should be without costs.

It is almost needless to remark that this is the Judgment only of those who heard the cause, and not of others of their Lordships who are now present—it is the judgment of Mr. Baron *Parke*, Lord *Brougham*, and myself.

SRI SUNKUR BHARTI SWAMI - - - - - Appellant,

AND

SIDHA LINGAYAH CHARANTI - - - Respondent.*

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Jurisdiction of Civil Courts—Grantee of dignity from Crown—Right of suit of as against usurper of such dignity—Right to exclusive exercise of Adavi Palki (right to be carried in palanquin in religious occasion) if a civil right—Assumption by another—If gives a cause of action—Duty of Subordinate Courts trying such actions—Practice.

Claim by the *Swami*, or chief priest of the *Smartava* sect of Brahmins, in *Bombay*, to the exclusive, right of *adavi palki*,—being carried crosswise in a palanquin, on ceremonial occasions, in virtue of a grant from the ruling power to a predecessor in office.

Whether an action is maintainable by the Law of *Bombay*, in the Civil Courts, by the grantee of such a dignity against a party who assumes the like privilege. *Quaere?*

20th June &
 5th July 1843.

THE question in this case respected a claim set up by the Appellant, as *Swami*, or chief priest, of a *samsthana* (college or residence); of the *Smartava* sect of Brahmins, to a special right and privilege called “*adavi palki*,” namely, of being carried on ceremonial occasions in a

* Present: Members of the *Judicial Committee*,—The Lord President, Lord *Brougham*, Lord *Campbell*, the Vice-Chancellor *Knight Bruce*, and the Right Hon. *Dr. Lushington*.

Privy Councillors,—Assessors,—Sir E. H. *East*, Bart., Sir A. *Johnston*, Knt., and Sir E. *Ryan*, Bart.

palanquin borne by the *hamals* (porters) crossways, so that the poles traverse the line of march ; and not lengthways, according to the ordinary mode in which palanquins are carried.

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According to an opinion which prevails amongst the Brahmins throughout *India*, a great religious teacher, named *Sri Sunkur Acharya*, who is represented as an incarnation of the Deity, flourished about 1,000 years ago, and reformed the Hindoo modes of worship, which had become very corrupt. He introduced so many changes, that he is looked upon as the founder of that, which is now regarded as the orthodox faith of the Hindoos, of which the Brahminical professors are called the *Smartava* sect, or that which professes the doctrine of the *Smritis*, or inspired code of laws. In order to preserve and propagate his doctrine, *Sunkur Acharya* established a *math*, or *savasthan* (college), at *Sringiri*, in *Mysore*, of which he was the *Swami* or high priest. From him descended a long line of *Swamis*, who presided over the *math* at *Sringiri*, and who are called heirs, or more correctly successors, of *Sunkur Acharya*. In process of time the *Sringiri savasthan* has become divided into five or six *maths*, of which the *Swamis* claim to be regarded as successors of *Sunkur Acharya*, and of his most eminent successor *Sri Vidyarana*, who flourished about seven centuries ago. As successors of these distinguished persons, the *Swamis* of these different *maths* claim and recognize in each other an equal participation in the honours and privileges accorded to the founder by the princes of *India*, who in all times appear to have held these *maths* in high honour, and treated their *Swamis* with the utmost reverence. Amongst the privileges and honours said to have been thus originally conferred, was the one now in contest.

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 The Appellant, who claimed to be heir or successor of the above-mentioned *Swamis* of *Sringiri*, contended that the privilege of the "*adavi palki*" appertains exclusively to those *Swamis* who are heirs and spiritual representatives of *Sri Sunkur Acharya* and *Sri Vidyanana Swami*.

A few years ago, the Appellant, the present *Sunkur Bharti*, came to *Dharwar*, in the Presidency of *Bombay*, which is near the town of *Hoobli*, where a large part of the population consists of *Lingayats*, or worshippers of *Siva*. Between this sect and the orthodox *Smar-tava* Brahmins there has existed a quarrel for many centuries. The Respondent, who was the *Charanti Ayah*, or chief priest of the *Lingayats*, at *Dharwar* and *Hoobli*, (having succeeded to that dignity about five or six years before the commencement of the present suit,) was in the habit of coming from *Dharwar* to visit a *math* of the *Lingayats*, at *Hoobli*, in his palanquin, which, according to the testimony of a great number of witnesses, had always, up to the year A.D. 1835, been carried by the *hamals* (porters) straightforward in the ordinary way. In that year, on the occasion of the religious festival of *Rath Ootsava*, (a ceremony in which an idol is mounted on a chariot, and carried throughout the public streets of the town in procession,) the Respondent was carried in his palanquin, borne crossways through the *javulla pet* (cloth market) of *Dharwar*; and afterwards, in the month of *July* in the same year, at a time when there was no religious festival, he came from *Dharwar*, attended by an immense crowd of *Lingayat* followers, and entered the town of *New Hoobli* in the palanquin carried crossways. This assumption of the peculiar privilege of the *Swami* of *Sringiri* was felt to be a great

outrage and insult by the *Smartava* Brahmins, who were assembled in large numbers near the pagoda of the god *Callamba* and the Appellant's *math*, and an affray took place between the parties, which led to the apprehension of several of the rioters, who were brought before the Session Judge of *Dharwar*.

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In consequence of these proceedings, and in order to settle the question of privilege, the Appellant instituted, on the 17th day of May, 1836, a suit in the *Zilla* Court of *Dharwar* against the Respondent, alleging that the privilege of being carried crossways in a palanquin belonged exclusively to him, and that it had not been hitherto enjoyed by any one except the *Swami* of the *savasthan* of the *Smartava* sect of Brahmins, and laid his damages at the sum of 15,000 rupees for the injury sustained by him by reason of the Respondent's assumption of the right in question; the Plaintiff also prayed for an order, that in future no one should act in opposition to the established rules, and carry a palanquin cross or sideways.

The Defendant by his answer took issue upon the allegations of the Appellant, and challenged the production of any *sunuds*, *sammut-patra* (deeds of gift or patents, of appointment), whereby he could substantiate his exclusive right. In the reply, the Appellant re-asserted his exclusive right to the privilege in dispute.

The Respondent having rejoined, and the suit being at issue, a great many witnesses were examined on both sides, and the depositions of the witnesses taken the preceding year, on the occasion of the affray at *Hoobli* were given in evidence by the Appellant.

The Appellant also examined seventeen witnesses, whose testimony went to prove that he had been car-

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ried in his palanquin cross or sideways; but no evidence was adduced by him to show that he had any exclusive right to be so carried; and no *sunud* or documentary evidence was produced, nor was any evidence given of any injury sustained by the Appellant, by reason of the Respondent having been carried in that manner.

It was established, by the evidence of witnesses examined on the part of the Respondent, that the *Ayah* or head of his sect had exercised the right in question for some years previous to the institution of the suit, and that the Respondent had himself also exercised the same right.

The Appellant presented a *durkhast* and framed interrogatories for the examination of certain persons of rank, whose evidence could only be procured through the medium of the Political Agent at *Dharwar* (Mr. *Dunlop*). The substance of these interrogatories was to require the witnesses to state what peculiar privileges the Appellant possessed? in what way the Appellant used his palanquin? and whether any one else was carried in the way the Appellant was? The Respondent framed interrogatories for the cross-examination of the same witnesses, seeking to elicit what proofs there were of the privilege claimed by the Appellant. Difficulties were raised by the Political Agent in proposing these questions to the persons whose evidence was desired. Amongst other objections, the Political Agent considered that the parties would not condescend to enter into or explain the proofs of any statements they might make. Eventually the Court came to the conclusion that the evidence of the persons in question could not be procured; making the observation, that even if the desired questions were forwarded,

it did not appear to the Court that they would go to prove the Plaintiff's case.

On the 24th of *October* 1836, the *Zilla* Court of *Dharwar* delivered its Decree, which, after stating the nature of the action, proceeded thus:—"The Court is of opinion that to grant to any one the exclusive privilege of going in procession in a palanquin carried cross-ways, and to forbid all others to do so, would be justified only by the most conclusive evidence of the former's right. He should have produced a *sunud*, and have proved that immemorial usage had been in conformity to the *sunud*. On reviewing what has been placed on the record in this suit, the Plaintiff has never asserted that there is any *sunud* extant, or that there ever has been. In interrogatories presented to the Court by the parties, for transmission, to *Chintamun Row Saheb*, of *Sangh*, there is some inquiry as to whether there are any '*dakhala*' (proofs) in his case, but it is this very expression which has elicited the Political Agent's objections. The evidence adduced by the Plaintiff, as to his enjoyment of the privilege, is deficient, both in substance and quality, and by no means amounts to proof; and the Court is of opinion the testimony produced by the Defendant is as strong in his favour in this particular." Hence the Court decreed that the Plaintiff had not established his right, either by documents or by prescription, and accordingly disallowed his claim, and directed him to pay all the costs of the action.

On the 21st of *November*, the Plaintiff petitioned the *Zilla* Court for a new trial, stating that on diligent search a *shasun*, or grant, inscribed on copper, had been discovered, which conferred the exclusive right to the privilege claimed. The Court having twice demanded

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1843. the production of the *shasun*, on the 29th of November ordered as follows:—"There seems to be no reason at all for a new trial, therefore the prayer of this petition is not complied with."

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The Plaintiff afterwards produced to the Court two *shasuns* on copper, when the Court made the following order:—"That no one can understand the *shasuns* in question, and it is also not known what language they are written in, and without an authentic translation they cannot be received."

From the Decree of the *Zilla* Court of *Dharwar*, the Appellant appealed to the *Sudder Dewanny Adawlut* of *Bombay*.

The Appellant tendered the copper *shasuns* to the *Sudder* Court as evidence of his title, but being in the *Nagri* character, they were transmitted by the *Sudder* Court with a precept to the *Zilla* Court of *Dharwar* for translation.

The alleged effect of the *sunuds* was that of a grant to *Vidyarana* of the privilege of going through the country in a palanquin sitting crossways. And before proceeding further, the Court called upon the Appellant to prove: that this privilege had been enjoyed since the date of the *sunud* by *Vidyarana's* heirs. It was also to be proved that he was *Vidyarana's* heir.

In conformity with this, the *Sudder* Court referred the proceedings back to the *Zilla* Court, to receive further evidence.

The Appellant examined witnesses, and produced some documents to prove his descent from *Vidyarana*, and the exclusive exercise by him of the privilege claimed. The Respondent also examined thirteen witnesses in opposition to the claim made.

The additional evidence having been remitted to the

Sudder, that Court resumed their consideration of the appeal, when *John Pyne*, Esq., the Third Acting Puisne Judge, recorded a minute bearing date the 24th of *January* 1838, whereby, after considering the case, he stated as follows:—"I would amend the Decree of the *Zilla* Court by awarding nominal damages to the Appellant, and prohibiting the Respondent from having his palanquin carried crossways; and even did I not do so, I would desire to refer a case of such importance to a full Court."

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In the month of *February* 1838, the suit came before all the Judges, and *J. B. Simson*, Esq., the Senior Puisne Judge, recorded the following minute:—

"To support such an action, I submit, the Plaintiff, the present Appellant, should have most satisfactorily established, not only that he had such privilege of riding on state occasions, but that he had the exclusive privilege, or at least that his rights were injured by the Respondent's assumption of a similar dignity, and that the Respondent had not authority to do so.

"In the original trial before the Judge at *Dharwar*, the Appellant failed to prove any part of his case. On learning what the Judge considered indispensable, viz. a specific *sunud*, he professed to have such a grant; and after much delay, and long subsequent to the decree against him, certain inscriptions on copper were produced, which the Judge refused as unintelligible.

"I submit that the evidence thus tardily and suspiciously adduced should at least be most cautiously admitted, and that in most cases these circumstances would go far to prevent its admission at all.

"Thus far as to form, which is palpably against the Appellant; the substance of the *sunuds* appears to me but little more in his favour.

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“Two inscriptions on copper are brought forward, professing to be written respectively A.D. 1244 and 1296, that is, between five and six centuries ago, by the reigning princes of ‘*Madhya Desh*’ and ‘*Dakshati Bang*,’ granting a certain *Gooroo* certain privileges. Their purport is not yet legally before the Court. Two *Bhats*’ signatures are attached to the alleged translation, but the *Bhats* themselves have never been examined as to the authenticity of the translations ; and I confess I have great doubts. Then, again, I see nothing to satisfy me that the copper plates themselves are genuine; thus I should reject them on the very threshold.

“But, supposing them to be duly admitted, we must be most liberal in our concessions to the Appellant before we award that a grant to the said *Gooroo* is to be continued to him, because he is considered by his disciples, after a lapse of centuries, the spiritual representative of the said *Gooroo*.

“Even waiving this objection, how is the Appellant’s claim supported by these copper plates? I do not understand the alleged *sunuds* to grant any exclusive privilege to the *Gooroo* to ride sideways in a palanquin on occasions of ceremony, and still less can it be gathered that such privilege is granted as an hereditary appanage to the *Gooroo*’s spiritual representatives, and it must be borne in mind that the Appellant’s right (except exclusively) is not called in question; he, on the contrary, gainsays the Respondent’s right.”

The learned Judge then stated that he was prepared to reject the Appeal, adding his reasons; to which Mr. *Greenhill*, another Judge, assented, stating the grounds of his opinion, both of which will be found in the Judgment of their Lordships (a).

(a) *Post*, 214, 15.

On the 23rd of *February* 1838, the three Judges of ^{1843.} the *Sudder Dewanny Adawlut* concurred in affirming the Judgment of the *Zilla Court* of *Dharwar* with costs. From this Decree the Appellant brought the present Appeal.

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Mr. *Charles Buller*, Mr. *Jackson*, and Mr. *Forsyth*,
for the Appellant.

This dispute is between the high priest of two rival sects. The Appellant, as the priest of the *Smartava* Brahmins, the Orthodox Hindoos, claims the exclusive right and enjoyment of the privilege of *adavi palki*. This privilege and honour is derived by the Appellant as the heir or spiritual successor of one *Sri Vidyarana*, who enjoyed the same by virtue of a grant from the ancient *Rajas* of *Anagoondy*. From the especial reverence in which the powers of *India* have held this privilege from remote times, it is clear that it cannot be usurped by the priests of other sects, who can show no similar grant, without derogation of the rights of the Appellant. It may appear, to our European notions, absurd to claim such a privilege, yet allowance must be made for the peculiar customs and the importance of this distinction in *India*. This high honour conferred upon, and exclusively exercised by, the Appellant and his predecessors beyond the reach of legal memory, has been infringed and damaged by the usurpation of the Respondent, who can show no such right by grant or custom.

[Lord *Brougham*: Have you any instance of an action being sustained in *India* by a person claiming the whole and entire enjoyment of any right or privilege against another, not for interfering with or disturbing his right or franchise, but for using it without authority?

1843. This is not an action for a disturbance of a right—it is
 SRI SUNKUR BHARTI SWAMI v. SIDHA I IN-GAYAH CHA-RANTI. for exercising that which you claim exclusively.]

The *Bombay* Regulation of 1827, chap. 2, sec. 21, cl. 1, enacts, that the jurisdiction of the Civil Court shall extend to the cognizance of all original suits and complaints, and for the recovery of damages on account of an alleged injury to the caste and character of the Plaintiff arising from some illegal act or unjustifiable conduct of the other party. And in *Nhanee v. Hureeram Dhoolubh* (a) an action was brought by the Plaintiff for loss of character, the Defendant having wilfully and maliciously caused the loss of his character by omitting to invite him to a solemn feast, and damages awarded. But it is said by the Respondent, that even assuming that our right was established, still no action could be maintained for such infringement. If, however, we can prove our right, though no pecuniary damage, we are entitled to maintain an action. *Ashby v. White* (b).

The cause has been improperly tried in *India*. The Courts refused to examine witnesses named by the Appellant, who, from their station and qualifications, could have given material testimony with respect to the privileges in question : this alone entitles us to have the cause remitted to *India* for a fresh trial, *Jeswunt Sing-jee v. Jet Sing-jee Ubby Sing* (c), if the Decree of the Court below is not at once reversed, as we submit it ought to be.

Mr. *Wigram*, Q.C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

The Appellant is under an absolute obligation to

(a) 1 Borr. Bom. Sud. Reps. 84. (b) Lord Raym, 938.

(c) 2 Moore's Ind. App. Cases, 424.

show that there was an exclusive possession of the privilege, and that such possession was under grants ; but the evidence adduced by him does not establish any title to the exclusive right or privilege claimed. The grants produced by them were inadmissible. No evidence was given where the *shasuns* had been kept, or from whose custody they came. But if such proof had been given, this was not a proper subject of an action, and the infringement complained of was not a legal tort. All honours or dignities must be considered as residing in the sovereign, who had the right of imparting to others those honours he originally held himself. He alone could complain of the usurpation, being the fountain of honour. Neither had the *Zilla* Court jurisdiction to entertain the suit. The *Bombay* Regulation of 1827, chap. 2, sec. 21, cl. 1, declares that the jurisdiction of the Court shall extend to have cognizance of all original suits respecting the right to moveable and immoveable property, rents, government revenues, debts, contracts, marriage succession, damages for injuries, and generally of all suits and complaints of a civil nature. It is clear that no jurisdiction is given to the Civil Courts by this Regulation to entertain a case like the present. If, indeed, there was a Court of Chivalry, as formerly existed in this country, a party might maintain an action. The *onus* would lie on the Appellant to show that there was a particular Hindoo Law which not only gave a right of action, but that there was a competent Court to entertain it. The case of *Nhanee v. Hureeram Dhoolubh* is against the Appellant's proposition, for there the *Sudder* Court expressly declared that they would not entertain any such action in future, unless some specific injury could be proved by the in-

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dividual complaining. No authority is given to the Courts in *India*, excepting the Supreme Courts, to exercise an equitable jurisdiction, by interfering by negative decree and restraining parties by injunction from doing acts. If, therefore, the right was established, the Courts could not prevent its infringement.

Upon the question of the rejection of evidence, we submit that the Court below was the only competent judge.

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LORD CAMPBELL:

This is an appeal against certain Judgments of the *Zilla* Court of *Dharwar* and the *Sudder Dewanny Adawlut* of *Bombay*. The Appellant, as *Swami* or Chief Priest of a College of the *Smartava* sect of Brahmins, claims by grant from the Supreme power of the State the privilege of *adavi palki*—of being carried on ceremonial occasions in a palanquin borne crossways, so that the poles traverse the line of march. The Respondent claims a like privilege as Chief Priest of the *Lingayats*, worshippers of the Goddess *Siva*.

The suit arose from the Respondent, in the month of *July* 1835, at a great religious festival at *Hoobli*, within the Presidency of *Bombay*, having been carried through the Bazaar in his palanquin crossways, attended by a crowd of *Lingayat* followers, in sight of large numbers of *Smartava* Brahmins, who, denying the right of the Respondent to this privilege, considered the assumption of it an insult to their sect. In consequence, on the 17th of *May* 1836, the *Plaint* was filed by the Appellant in the *Zilla* Court, asserting his own right; complaining of the usurpation of the Respondent, claiming damages, and praying an order in the nature of an

injunction, that in future the Respondent should not be carried in a palanquin crossways.

Their Lordships see great reason to lament the manner in which the suit has been conducted and disposed of both in the *Zilla* Court and in the *Sudder Dewanny Adawlut*. After a protracted litigation and an enormous expense, they are not now enabled to decide the rights of the parties, and they are driven to remit the cause for further consideration and inquiry.

The Judges below had a plain course to pursue—to consider first, whether, assuming the facts alleged to be true, they had jurisdiction to entertain the suit ; and if they had, then giving the parties the opportunity to adduce their evidence, to see whether the right claimed by the Appellant was established, and that claimed by the Respondent was negatived. But no distinct opinion is expressed by them respecting the law of the case, whether the action is maintainable or not, and, important evidence being excluded, the facts are left in a state of great uncertainty ; so that we cannot venture with any safety, either to affirm or reverse the Judgment by which the Appellant is said to have been nonsuited. We do not expect to see proceedings in the native Courts in *India* conducted with technical form and precision, but the suitors ought to have the benefit of the exercise of industry, caution and intelligence on the part of the Judges.

In this case it was proposed by the Appellant to examine certain witnesses, some of whom had enjoyed sovereign authority in the territory over which the disputed right was to be exercised. There appears great reason to believe, that the evidence of these witnesses might have been obtained in a shape in which it would have been admissible ; but the Judge of the *Zilla* Court,

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 BHARTI which had been prepared by the *vakeel* of the Appel-
 SWAMI lant, nor frame interrogatories in due form himself;
 SIDHA LIN. which it is certified to us that it was the duty of his
 GAYAH CHA- office to have done. On the 21st of *October* 1836 he
 RANTI. made the following order :—"The Defendant's ob-
 jections have been fully weighed, and it does not appear
 right or proper to forward the questions aforesaid to
Maharaja Appa Saheb, &c. Even if they were sent, it
 does not appear to the Court that they would go to
 prove the Plaintiff's case." The meaning of the last
 observation their Lordships are unable to understand,
 as the questions go directly to establish, as alleged by
 the Plaintiff, the grant of the privilege and the exercise
 of it, and to prove that no such right had been exer-
 cised by the Defendant or his predecessors.

However, on the 24th of *October* 1836, the Judge
 pronounced a Decree against the Appellant, finding
 "that he should have produced a *sunud*, and have
 proved that immemorial usage had been in conformity
 to the *sunud*; that the evidence adduced by the Plain-
 tiff as to his enjoyment of the privilege was deficient,
 both in substance and quality, and by no means
 amounted to proof, that the evidence produced by the
 Defendant was as strong in his favour in this particular;
 that the Plaintiff's claim was disallowed, and that he
 should pay all the costs of the action."

On the 21st of *November* 1836, a petition was pre-
 sented to the *Zilla* Court, for a new trial, on the ground
 of the rejection of evidence, and the discovery of two
 copper *shasuns*, *sunuds* or grants, one made by the
Raja of *Anagoondy*, 538 years ago, whereby the *adavi*
palki was granted to the high priest, under whom the

Plaintiff claims. But the Judge determined “that there seemed to be no reason at all for a new trial, and that the prayer of the Petition should not be complied with.”

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The Plaintiff thereupon appealed to the *Sudder Dewanny Adawlut*, and prayed that the *shasuns* might be received in evidence.

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These *shasuns* were in the *Nandi Nagri* character, of the *Sanscrit* language, now almost unknown in *India*. The Court, without any proof of the place where they had been kept or found, received them in evidence, and ordered them to be translated into the *Mahratta* language. They professed to contain a grant by the *Raja* to *Vidyarana*, the Priest, whose successor the Plaintiff claims to be, of (among various other privileges) the *adavi palki*,—being carried crossways in a palanquin.

The translation being received, the Court resumed the consideration of the case, and, on the 26th of *September* 1837, made the following interlocutory order :—
“The *sunuds* were translated as ordered. From these it would appear that *Vidyarana* has had the privilege of going through the country in a palanquin, sitting crossways. Appellant is called upon to prove that this privilege has been enjoyed since the date of the *sunud* by *Vidyarana*’s heirs. It is also to be proved that he is *Vidyarana*’s heir—Respondent is to be allowed to produce evidence to *refute* it.” And a reference was made to the *Zilla Judge* of *Dharwar*, to take depositions on this issue.

A great number of witnesses were accordingly examined, and certain documents were produced on both sides.

At last, on the 24th of *January* 1838, Mr. *Pyne*, one of the Judges of the *Sudder Dewanny Adawlut*,

1843. gave his written opinion in favour of the Appellant.
 SRI SUNKUR BHARTI SWAMI —“ On a review of this case, traditionary evidence
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 GAYAH CHA- lineally descended *Gooroo* from *Vidyarana*, on whom
 RANTI. the privilege of sitting in a palanquin carried crossways
 was bestowed by *Kudumber Row*, *Raja* of *Syadree Desh* in *Saka* 1217. That the possession of a *sunud* to
 this effect by the Appellant, is confirmatory of such
 being the fact; that the documentary evidence produced
 by the Appellant, shows that, for nearly three-quarters
 of a century, the *Gooroo*s, from whom he inherits, were
 styled by the *Peishwa* as *Swanri* of *Sringiri math*; and
 that, lastly, the local European authority in the *Mysore*,
 has recorded it as his opinion, that the Appellant has
 the exclusive distinction of sitting in a palanquin car-
 ried crossways.

“On the foregoing grounds, and as the Respondent
 has adduced no proof whatever in favour of his usur-
 pation of this honorary distinction, I would amend
 the Decree of the *Zilla* Court by awarding nominal
 damages to the Appellant, and prohibiting the Re-
 spondent from having his palanquin carried crossways;
 and even did I not do so, I would desire to refer a case
 of such importance to a full court.”

But, on the 21st of *February*, Mr. *Simpson*, another
 Judge of the *Sudder Dewanny Adawlut* (who had been
 the Judge to decide the case in the *Zilla* Court), gave
 his opinion in favour of the Respondent, concluding
 in these words:—

“From the foregoing I am prepared to reject the
 Appeal—

“1st. Because the evidence upon which it is at-
 tempted to set aside the Decree of the lower Court has

been brought forward in an informal and suspicious manner, so as to require its being received with caution if received at all.

“2nd. The copper plates produced by the Appellant are not legal evidence.

“3rd. Whatever may be the immunities bestowed on the original grantees, the grants do not appear to me hereditary or exclusive.

“4th. I do not consider the Appellant to have proved his descent from the grantee.”

Mr. *Greenhill* followed: and, after commenting on the Appellant's case, as originally brought forward, he says:—“After the case was decided in the *Zilla* Court, where he did not even seem to have been aware of their existence, he produced two copper deeds, written in old characters, which having been translated, offer to confer on the person named, certain honours, one of which is, that he may ride in his palanquin carried crossways, as it has been translated. These deeds have every appearance of being genuine, and, supposing them to be so, and that the Appellant is the representative of the grantee therein named, they do not appear to prohibit other persons from riding in their palanquins in the same manner. The same *sunuds* give the right of riding his horse in a particular manner, and of using an umbrella; but it is not for a moment to be supposed that no other person was ever to be permitted to use an umbrella, because the honour was conferred upon the individual alluded to.

“The use of palanquins, of horses, of umbrellas, &c., were, in former times, and indeed at this day are, considered as marks of distinction when conferred by the Government; but I do not see that a person so honoured has any right of action against another who

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assumes a similar pageantry, unless he can show that it injures him unjustly. The Government being the source of all honours of this kind, may permit their use by whomsoever they choose, and, although it could, probably, by usage, prohibit the assumption, I am not prepared to allow that any private individual can interfere with what is the natural right of all, so long as it neither injures nor interrupts that person, and, therefore, I am of opinion that the Appellant should be nonsuited with costs."

On the 23rd of *February* 1838, the *Sudder Dewanny Adawlut* pronounced final judgment, by which it confirmed the *Zilla* Judge's Decree, and condemned the Appellant in all costs.

This Judgment their Lordships cannot confirm. It does not regard the ground of appeal arising from the rejection of evidence in the *Zilla* Court, and their Lordships think that an order should have been made, allowing the Appellant to have the benefit of the examination of the witnesses, to whom the suppressed interrogatories were addressed.

Again, after the Order of the 26th of *September* 1837, Mr. *Pyne* could not be justified in treating the *sunuds* as forged. Before that Order was made, there certainly ought to have been an inquiry respecting the custody of the *sunuds*, but the Appellant had reason to believe that their genuineness was admitted by an intimation from the Court that he was only to prove the exercise of the privilege and the spiritual pedigree.

Mr. *Greenhill*, who concurs with Mr. *Simpson*, in deciding against the Appellant, considers the *sunuds* genuine, and it is not quite easy to understand whether he proceeds upon the construction of the *sunuds*, or on

the ground that, in point of law, at all events the action is not maintainable, although the other two Judges seem to have concurred in the contrary opinion.

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It was strongly impressed upon us by the Respondent's counsel, that we should take upon ourselves to decide that the action is not maintainable, and on this ground to affirm the Judgment, whatever miscarriage there might have been in the conduct of the suit; but this ground of defence not having been taken before, and never having been solemnly considered by the Judges below, and no authorities from the Law of *Bombay* being cited to us, we cannot venture to give it effect. In *England*, although an action may be maintained for the disturbance of an office or franchise, an action could not be maintained by the grantee of a dignity from the Crown against a person who, without a grant, should assume the like dignity; but it does not necessarily follow that such is the Law in *Bombay*.

The usurper of a dignity is guilty of a wrong which is, to a certain degree, prejudicial to every one who has a just title to the dignity; and the manner in which such a wrong is to be redressed must depend upon the municipal laws of each particular country. There may be no remedy, except by application to the executive Government, to punish the usurpation, or there may be a remedy to every one whose dignity is lowered by the usurpation in a right of action against the usurper. Even in this country it would appear that, in ancient times, when armorial bearings were assumed without authority, the family who had a right to bear them might sue in the Court of the Earl Marshal and might obtain an inhibition. The right of *adavi palki* is of quite as substantial a nature, and the western nations,

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who attach so much importance to titles, orders, and decorations, have no pretence for treating with levity the marks of distinction conferred by the sovereign authority and highly valued in the East, such as the right to wear a particular button, to use a fan made from a cow's tail, or to be carried crossways in a palanquin.

For these reasons their Lordships cannot advise that the Judgment should be affirmed; but they are by no means prepared to say that judgment should be given for the Appellant according to the prayer of his plaint. How his case would have stood had the witnesses been examined whom he propounded, we cannot tell, but the evidence actually adduced in the *Zilla* Court was insufficient to establish his right, or to negative that of the Respondent. In the *Sudder Dewanny Adawlut*, the *sunuds* were brought forward under circumstances of great suspicion, and they ought not to have been received without inquiry into the custody from which they came, or other proof, to show that they were genuine. Nor has sufficient attention yet been given to the effect of them or to the consideration whether the Appellant having made out his right, and negatived the Respondent's, has any remedy by action, or can only apply for redress to the police, or to the executive Government at *Bombay*.

Their Lordships, therefore, however much they may regret that litigation should be prolonged on such a subject, feel themselves under the necessity of advising that the case should be remitted to the *Sudder Dewanny Adawlut* for a new trial, each party paying his own costs of this Appeal, and all other costs to be in the discretion of that Court at the conclusion of the suit. Their Lordships beg to express a wish that the Judges of the Court will, in the first instance, consider

whether the action is maintainable, the allegation of the Appellant in point of fact being proved; and if they are of opinion in the affirmative, that they will carefully inquire into the custody and genuineness of the *sunuds*. Should these documents be forged, the Appellant must fail; for, whether the existence of a *sunud* might be presumed from the immemorial exercise of the privilege, when he rests his case upon *sunuds* actually produced, by them he must stand or fall. If the Court should be satisfied that the *sunuds* are genuine, and that the privilege is conferred by them, the next inquiry will be, whether the Appellant is to be considered the successor of the grantee, and there has been enjoyment under them. Lastly will come the right of the Respondent. If that be negatived *prima facie*, by proof of non-exercise or interruption, the *onus* will be cast upon him, of strictly establishing it. Their Lordships trust that the Judges will use the necessary means for having witnesses of high rank, who would object to taking an oath, examined without oath, according to the Regulations now in force upon that subject, and having the interrogatories so framed as to elicit the truth from them without offending their dignity. The rights of the parties may thus be at last satisfactorily settled, and the character of our Indian Government for the enlightened administration of justice, effectually upheld.

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NUGENT KIRKLAND, Esq., Collector of } *Appellant,*
Kaira - - - - - }

AND

MODEE PESTONJEE KHOORSEDJEE - *Respondent.**

On Appeal from the Sudder Dewanny Court at Bombay.

Decree—Execution—Decree for a certain sum affirmed by the Privy Council—No mention of interest—Executing Court—Jurisdiction to award interest on judgment debt—Discretion.

Leave to appeal granted, on payment of costs, from an Order of the *Sudder Court at Bombay*, decreeing interest upon the amount awarded by the Judgment of the Court; the Appellant having failed to apply to the Court in *India* within six months, as required by the Order in Council of the 10th *April* 1838.

According to the practice of the Native Courts in *Bombay*, a sum found due for mesne profits, is a judgment debt, and carries interest by its own force.

On Petition in the Native Court, after Decree upon appeal in *England*, interest awarded on the amount of mesne profits decreed, although not prayed for in the Plaint, or given by the Decrees in *India*, or the Order of affirmance in *England*.

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THE facts of this case are reported in a former volume (a), so far as they relate to the proceedings in the suit instituted by the Respondent against the then Collector of *Kaira*, as the representative of the *Bombay* Government, for the recovery of the *enam* village of *Rawlej*, and the revenue thereof during the time the Government was in possession of the village. By an Order in Council, made in the Appeal, bearing date the 5th day of *July* 1838, it was ordered, “that the said Decree of the Court of *Sudder Dewanny Adawlut* of *Bombay* of the 31st of *December* 1832 should be affirmed, with costs, whereof the Judges of the Court of *Sudder Dewanny Adawlut* at *Bombay* were to take notice, and govern themselves accordingly.”

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan, Bart.

(a) 2 Moore's Ind. App. Cases, 37.

After the arrival in *India* of this Order in Council, the Respondent, in order to have execution upon the judgments in his favour, on the 17th of *December* 1838 petitioned and moved the *Sudder* Court to issue instructions to the *Zilla* Court to give execution to the Respondent, as follows:—

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“To cause the *enam* village of *Rawlej* to be made over to me, conformably to the terms of the original *sumud*.

“To cause the amount of the proceeds of the said village to be paid to me.

“To cause the amount of the costs incurred by me in the *Zilla* Court, the *Sudder Adawlut*, and in *England*, to be disbursed to me, agreeably to the Decrees.

“To cause interest to be paid to me, from the date of the *Zilla* Court’s Decree, to that of payment, at the rate obtaining among the mercantile community, in conformity to the practice of the Court.”

On this Petition the *Sudder Adawlut* made the following Orders:—“It is intimated that instructions will be issued to the Judge of the *Ahmedabad Zilla* for the execution of the Decree, dated 31st of *December* 1832.

“It is intimated that on the subject of interest, an application should be made, in the first instance, to the *Zilla* Judge.”

In the month of *April* 1839, the village was restored to the Respondent, and payment of the 60,000 rupees, the sum awarded for arrears, and of the costs, was made by the Collector to him.

On the 9th of *October* 1839, the Respondent petitioned the *Zilla* Court to be allowed, upon the judgment, interest on the 60,000 rupees, to be cal-

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KIRKLAND *Zilla* Court, to the 3rd of *April* 1839, the day when
v.
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KHORSED- The Collector, on the 12th of *November* 1839, filed
JEE. his answer to the Respondent's Petition, denying his right to the interest claimed; and, on the 18th of the same month, the *Zilla* Court informed the Respondent that "orders for the payment of interest could not be given on this Petition, and that, if he choose, he might bring an action on the subject."

On the 18th of *February* 1840 the Respondent petitioned the *Sudder Adawlut*, setting forth, in his Petition, the practice to be, for the Court, in giving execution of Decrees affirmed on appeal, to award interest from the date of the original Decree; and also setting forth that the sum found by the Decree to be due to the Respondent was in the nature of a debt bearing interest, and praying, therefore, that the Court would be pleased to cancel the order of the *Zilla* Judge, and issue orders to him to cause the Collector to pay to the Respondent interest at the Government rate from the date of the original Decree.

On the 5th *March* 1840 the *Sudder Adawlut* made the following Order:—

"It is intimated that the *Zilla* Judge's Order has been cancelled, and that the payment of interest at the rate of 6 per cent. per annum on the amount awarded by the Queen in Council's Judgment, from the original Decree to that of the execution of the Privy Council's Decree, will be enforced from the opposite party."

The Appellant, on the 16th day of *November* 1840, presented a Petition to the *Sudder Adawlut*, praying that previously to the payment by him to the Respon-

dent of the Rs. 31,638. 5a. 7p., the amount of interest awarded, the Respondent might give security for the repayment of the amount in the event of the said Order for the payment of interest being reversed upon appeal.

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The *Sudder* Court granted the prayer of this Petition, by an Order, bearing date the 16th of *November* 1840, and security was accordingly given by the Respondent. The Appellant thereupon paid to the Respondent the sum of Rs. 31,638. 5a. 7p.

The Appellant, on the 9th of *January* 1841, filed, in the *Sudder Adawlut*, his Petition of Appeal to Her Majesty in Council, which was received without any objection on the part of the Court ; but afterwards, on the 28th of *June* 1841, that Court made an Order to the effect, that in consequence of the Petition of Appeal not having been presented within six months from the date of the decretal Order, from which it was an Appeal, (the said Order being dated the 3rd of *March* 1840, and the motion for the admission of the Petition of Appeal bearing date the 16th of *November* following), it was not competent to bring forward the Petition of Appeal (a); and the previous Order of the *Sudder* Court calling on the Respondent to give security was cancelled, and process ordered to be issued to the *Zilla* Court for executing the Order of Her Majesty in Council. The security-bond which had been given by the Respondent, was accordingly declared null and void.

In consequence of this proceeding, the Appellant presented his Petition to Her Majesty in Council, thereby stating, amongst other things, that he did not desire to contest the payment of any part of the interest

(a) See Order in Council of the 10th *April* 1838. 1 Moore's Ind. App. Cases, ix.

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JEE. which accrued from the date of the final decree of Her Majesty in Council, but he disputed the competency of the Court below to open questions concluded by the final Decree, and praying for leave to appeal from the Orders of the 5th of *March* and the 14th of *September* 1840.

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The Petition came on for hearing on the 13th of *December* 1841.

Mr. Serjeant *Spankie*, and Mr. *E. J. Lloyd*, in support of the Petition, and

The Solicitor-General (Sir *Wm. Follett*), and Mr. *A. Lewis*, *contra*.

Their Lordships granted the application, upon terms of paying the costs and undertaking to pay interest from the date of the final Decree in *England*.

By an Order in Council, bearing date the 15th of *January* 1842, it was ordered that leave be granted to the Appellant to enter and prosecute his appeal from the said orders, the Appellant confining his appeal for the amount of interest between the 8th of *May* 1829 (being the date of the Decree of the *Zilla* Court), and the 3rd of *July* 1838 (being the date of the Report of the Judicial Committee to Her Majesty), upon giving security for such interest.

The Appeal now came on for hearing.

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Forsyth*, for the Appellants.

The Decrees of the *Zilla* Court of the 8th *August* 1829, and the *Sudder* Court on appeal, were final

* Present: The Lord President (Lord Wharncliffe), Lord Brougham, Mr. Baron Parke, and the Right Hon. Dr. Lushington.

Decrees, conclusive and binding between the parties. 1841-3.
 Neither of them gave or allowed any interest, or can KIRKLAND
 be construed to carry interest of its own force, nor v.
 did the Order in Council, founded upon the Decree of MODEE PES-
 affirmance in *England*, award or direct any interest TONJEE
 upon the amount recovered by the Respondent, and KHOORSED-
 any possible claim in respect to such interest was JEE.
 concluded by such Order. If the Courts had intended
 to give interest, which they had the power to do by
 the *Bombay* Regulations (a), it would have been men-
 tioned in the Decree: thus, in the case of *Edul-jee*
Fram-jee v. *Abd-oolla Hajee Cherak* (b), provision was
 made in the Decree for interest due on the principal
 sum adjusted. No law or practice exists in *Bombay*
 making a final Decree, silent as to interest, carry interest
 by its own force. The same rule prevails in Courts of
 Equity in *England*. In *Creuze* v. *Hunter* (c), an ap-
 plication by Petition for interest, not reserved by the
 Decree, was refused by Lord *Loughborough*. Before the
 passing of the 3rd & 4th *Will. IV.*, c. 42, by which Act
 interest is given in cases of Writs of Error upon the
 amount of the judgment, if affirmed, it was discre-
 tionary to give costs. It is doubtful whether the act of
 the Court in *India* in ordering interest to be paid, was
 a ministerial or judicial act—whether it was open to
 them to give or refuse interest. It cannot be said that
 the demand in this case was such as in its nature car-
 ried interest. The original plaint does not even ask
 for interest, upon the demand for the rents and profits
 of the villages it sought to recover, therefore it can-

(a) Reg. IV. of 1827, chap. 14, sec. 60, cl. 4; and chap. 19, cl. 1, of the same Reg.

(b) 1 Moore's Ind. App. Cases, 466.

(c) 2 Ves. Jun. 157.

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The Solicitor-General (Sir *Wm. Follett*), and Mr. *A. Lewis*, for the Respondent.

The amount recovered by the Respondent in the original suit was a judgment debt, bearing interest. The Court acted properly in awarding execution of the debt, according to the usual course and practice of the Indian Courts. The argument, that the Decrees are silent as to interest, is of no force, for it is apparent from the precedents which have been referred to in the Court below, that the Indian Courts are in the habit of giving interest. In *Sorab-jee Vacher v. Koonwur Manik-jee* (a), as in the present case, no mention was made of interest, yet the Judges of the *Sudder* Court, on the proceedings from *England* again coming before them, ordered interest to be paid. Interest would be given upon a similar case in this country. The Statute, 3rd & 4th *Will. IV.*, c. 42, sec. 30, provides that interest should be allowed for such time as execution has been delayed by the Writ of Error. The case cited as to the practice of the Court of Chancery in *England* can have no bearing. This appeal resolves itself into a mere question of procedure and practice, and in the

(a) Moore's Ind. App. Cases, 61.

circumstances, as it has only worked substantial justice, the Court will not interfere with the orders complained of.

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The Vice-Chancellor KNIGHT BRUCE :

The question in this case is, whether a person from whom a fixed ascertained sum of money adjudged to be due, has been, without any just ground, withheld, shall be allowed interest against his debtor for the time subsequent to the adjudication. Abstract justice certainly is in favour of the claim, and, independently of what the Legislature has done, the tendency (if such an expression may be used) of Courts of justice in this country, in modern times, has been rather for, than against, a demand of this description. If, however, there be any rule of law or practice against the Respondent upon the point, the Appellant is entitled to the benefit of it.

Upon the general question whether a judgment of the description before us does, in its nature, carry interest, it is not necessary for their Lordships to give any opinion. It appears to them, that if a practice or rule of procedure exists in the *Sudder* Court, granting discretionary interest upon judgments of this sort affirmed by Her Majesty in Council, such a practice or rule of procedure is neither unreasonable nor unlawful.

One instance, at least, was mentioned in the Court below, and has been cited to their Lordships, in which a course as to interest was taken analogous to that which has been taken here, and furnishing a precedent for what the *Sudder* Court did in this case.

The whole aspect of the papers on both sides, showing what passed in the Court below, appears to their

1841-3. Lordships much more consistent with the existence of
 KIRKLAND such a practice or rule of procedure, according to the Re-
 v. spondent's contention, than with the contrary supposi-
 MODER PESTONJEE tion. And it appears to them, on the whole, the correct
 KHOORSEED- conclusion to accede to the Respondent's view of this
 JEE. part of the case. Viewing this as a matter of discretion
 in the *Sudder* Court, their Lordships cannot say that
 the discretion was otherwise than properly exercised.
 They are of opinion that the Court did what was just
 and reasonable under the circumstances. That the
 Order of Her Majesty in Council on the original ap-
 peal did not touch the question of interest, does not
 appear to their Lordships material. They consider
 that it left the Court of *Sudder Dewanny* at liberty to
 act upon its own rule of practice and procedure in
 this respect.

It has been suggested, that a distinction may be made
 as to interest anterior to the time when the arrears
 were reduced, from those of eleven years, to those of
 six. Their Lordships, however, cannot accede to that
 argument. The amount unquestionably due might
 have been tendered, and might not have been made
 the subject of appeal.

Leaving untouched, therefore, the question whether
 the present was a case in which an appeal could be
 regularly brought before Her Majesty in Council, their
 Lordships are of opinion that, upon the merits, for the
 reasons which have been stated, this Appeal must be
 dismissed, with costs.

DHURM DAS PANDEY and others - - Appellants,
 AND
 MUSSUMAT SHAMA SOONDRI DIBIAH - Respondent.*

On Appeal from the Sudder Court at Bengal.

Hindu—Joint family—Evidence of nucleus—Presumption as to joint character of all properties—Property in the name of one member—If separate—Burden of proof—Adoption—Effect—Divesting of estate—Nonjoinder—Objection as to—If to be allowed for first time in appeal—Widow prosecuting suit after adoption—If does so as guardian for him—Liability to account to adopted son.

The presumption of law is, that the whole of the property of an undivided Hindoo family is in coparcenary.

The *onus* lies on a member of such family to prove that it was separately acquired.

This Court will not entertain a technical objection which was not taken in the Court below, where it might have been amended.

A childless Hindoo, by Deed, directed his wife to adopt a child. After his death his widow brought a suit for a partition, and to be put in possession of her husband's share, in the joint undivided estate. Pending the suit, she adopted a son. By the Hindoo law, the act of adoption divested the property from the widow and vested it in the adopted son, subject to the maintenance of the widow. Notwithstanding the adoption, the suit was prosecuted in the widow's name, and a Decree made, directing her to be put in possession.

Held, in such circumstances, that she prosecuted the suit as the guardian of the adopted son, and was put into possession as his trustee, and accountable to him for the profits of the property so decreed to her.

THIS was an Appeal from the Decree of the *Sudder Dewanny Adawlut* of Bengal, which affirmed, on appeal, a previous decision of the Provincial Court of *Moorshedabad*, by which the Respondent, as the widow and representative of one *Huradhun Pandey*, deceased, was decreed to be entitled to a five *ana* share, or a third part, of certain *mouzas* and personal estate, then in the possession of *Dhurm Das Pandey*, and his sons, the original Defendants.

7th & 8th
 Dec. 1843.

The ground of the Respondent's claim was, that the property in question was a joint family property, and that her deceased husband, the nephew of the Defen-

* Present: Members of the *Judicial Committee*—Lord Campbell. Mr. Justice Erskine, the Right Hon. Sir Herbert Jenner Fust, and the Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

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dant, *Dhurm Das Pandey*, was in his lifetime entitled as one of the co-sharers, and members of an undivided *Hindoo* family, to participate therein.

Pran Chund Pandey, the common ancestor, had four sons, viz., *Dhurm Das Pandey*, *Suroop Chund Pandey*, (the father of the Respondent's deceased husband,) *Anroop Chund Pandey*, and *Nihal Chund Pandey*. It was not distinctly ascertained by which of the members of the family, the several particulars constituting the property in dispute were acquired. But the four brothers lived and ate together, no separation in commensality or property having ever taken place between them, and *Suroop Chund Pandey* continued in joint seisin and possession till the period of his death in 1217, (1810-11, A.D.) when he was succeeded by his son and heir, *Huradhun Pandey*. *Anroop Chund Pandey*, however, the third son of *Pran Chund Pandey*, died first, and without issue; but his wife *Mussumat Subannah Musey*, having seceded from her religion, renounced the world, retired into seclusion, and relinquished all claims to the family property. By this means the family property became divisible into thirds.

Huradhun Pandey, the son of *Suroop Chund Pandey*, and husband of the present Respondent, lived in coparcenary and commensality with his uncle *Dhurm Das Pandey* and his sons, and while thus living in family partnership, married *Shama Soondri Dibiah*, the Respondent. Soon after his marriage, and in the month *Katik* 1224, (October and November 1817, A.D.) he died, having previously duly executed an *ijazut-nama* in writing to his wife *Shama Soondri Dibiah*, in which he commanded her to adopt a son, and gave his share of the joint family property to her, and to the son which he thus authorized her to adopt. The determi-

nation on the part of the Respondent, in consequence of family disputes, not to adopt one of the descendants of *Dhurm Das Pandey*, led to an open rupture on the part of himself and his sons with the Respondent, and they dispossessed her of her share of the joint family property. In order to obtain a restoration of the possession of her share, the Respondent, on the 8th *September* 1827, filed her plaint in the Provincial Court of *Moorshedabad* against *Dhurm Das Pandey*, and his sons *Budun Chund Pandey*, *Gooroo Churn Pandey*, and *Sadhoo Churn Pandey*, claiming to be entitled to a moiety of the family property, on the representation that the fourth brother, *Nihal Chund Pandey*, was dead, without issue, and seeking to recover from the Defendants, rupees 2,18,969, 4 *anas*, 17 *gundas*, 3 *cowries*, as the value of her moiety, or half share of the *zemindary* and other real and personal property situate in the *zillas* of *Moorshedabad* and *Bheerboom*, the joint undivided property of the Plaintiff and the Defendants.

Dhurm Das Pandey, filed his answer to the plaint, in which he admitted that the Plaintiff's husband was a member of the family, but denied that the property claimed by the Plaintiff was the joint acquired property of the Plaintiff's father-in-law, *Suroop Chund*, while in commensality, but insisted that he and his deceased son *Ram Kaurt*, and *Budun Chund*, had purchased it with their own money, and that neither the Plaintiff nor her late husband or her father-in-law had any interest whatever in it; that *Nihal Chund* had made a deed of gift, and that the Plaintiff's late husband, *Huradhun Pandey*, had executed an *ikrar-nama*, or written document, acknowledging that the property in dispute was the self-acquired property of the De-

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fendants, and transferring to *Dhurm Das* his *Hurad-*
hun Pandey's, interest in his father and grandfather's
 estate. At the foot of the answer of *Dhurm Das*
Pandey, *Budun Chund Pandey*, *Gooroo Churn Pandey*,
 and *Sadhoo Churn Pandey*, his sons, recorded their
 joint answer, corresponding in substance with the an-
 swer of their father.

To these answers the Plaintiff filed a replication, in
 which she again insisted on her right to the share sued
 for, and denied that *Huradhun Pandey*, her husband,
 had ever executed such *ikrar-nama* in favour of De-
 fendant *Dhurm Das Pandey* as he set up by his answer;
 she further stated, that under the authority of the
ijazut-nama she had, since the institution of the suit,
 adopted a son, and named him *Ram Dhun Pandey*.

On the part of the Plaintiff, witnesses were produced,
 who proved the joint interest and partnership of
Suroop Chund and his son *Huradhun* with *Dhurm*
Das and his family, and the *ijazut-nama* filed in the
 Provincial Court was proved by four of the attesting
 witnesses to have been the one executed by *Huradhun*
Pandey in favour of his wife, previous to his decease.

The Defendant examined various witnesses, with a
 view of proving that the property claimed by the Plaintiff
 had been acquired by himself and his sons, but their
 testimony was met and contradicted by the witnesses
 examined on the part of the Plaintiff.

On the 19th of *June* 1829, *P. E. Patten*, Esq., the
 Judge of the Provincial Court of *Moorshedabad*, made
 his Decree, and finally ordered that the case be decreed
 to the Plaintiff, and that she be put in possession
 of a five *anas*, six *gundas*, two *cowries*, and two
krants share of the property claimed, and enumerated
 in the inventory thereto annexed, and mentioned in

the petition of plaint as in the possession of the Defendant: and the Defendants were ordered to refrain from interference and possession of the property, and the name of the Plaintiff was to be recorded in the office of Government, as proprietress of the *talooks* therein stated, in the proportion of the calculation given, with costs, to be paid by Defendants.

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From this Decree the Defendants appealed to the *Sudder Dewanny Adawlut*.

Further documentary evidence was then presented on both sides, the substance of which is stated in the Judgment of the Court.

On the 9th of *April* 1833, the Judge of the *Sudder Dewanny Adawlut* declared his opinion in favour of affirming the Decree appealed from, and after stating all the previous circumstances of the case, recorded as follows:—"In my opinion, the decision of the Provincial Court, for the following reasons, is worthy of being affirmed:—

"First. From the evidence of the witnesses of both parties, and documents on the file of the Provincial Court, it is clearly proved and established, that all the four brothers, (that is to say,) *Dhurm Das*, and *Suroop Chund*, and *Nihal Chund*, and *Anroop Chund*, were co-partners, and boarded and lodged together, and that after the death of *Suroop Chund*, *Huradhun*, his son and heir, in the same manner as his father, continued with his uncles as joint sharer.

"Secondly. The wedding of *Huradhun*, husband of the Respondent, was effected from the joint money.

"Thirdly. From the copies of petitions filed after the death of *Suroop Chund*, by *Dhurm Das Pandey*, and *Budun Chund Pandey*, and *Gooroo Churn Pandey*, and *Sadhoo Churn Pandey*, in the Government office,

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praying the name of the deceased be erased, and that their own names, and that of *Huradhun Pandey*, be recorded, it is clearly proved that in them the aforementioned acknowledged and admitted of the partnership and joint interest of *Huradhun*, which circumstance is duly corroborated by a copy of the *rubakary* of the collectorate, dated 28th *January* 1817, stating that their names, conjointly with the name of *Huradhun*, were to be found in the Government records for the *talooks* in dispute.

“Fourthly. From the copy of the petition filed on the part of *Budun Chund* and *Huradhun*, jointly in one paper applying for a public sale of the property of defaulting *ryots* of *Lat Killa*, the Plaintiff’s husband’s coparcenary interest with Appellants is also clearly established.

“Fifthly. From among the *mahals* in dispute, the most important *mahals*, such as *Lat Killa* and *Dechapa*, were purchased in the name of *Suroop Chund*. Hence it cannot be imagined that without his possessing a right, his name would have been inserted; and it is likewise proved, that *Huradhun*, the Respondent’s husband, at the time of his death, was twenty-two years of age, and that a few days anterior to it he executed an *ijazut-nama* in favour of his wife, the Respondent, for the adoption of a son; and the Respondent some years after his death, agreeably to the above document, adopted as her son *Ram Dhun Pandey*, although from among the objections of the Appellants, two objections, first, the *ikrar-nama*, dated the 15th *Katik* 1224, *Bengal Era*, produced by them under the allegation that it was executed to them by *Huradhun Pandey*, disclaiming his participation in the property of his grandfather and father; and secondly,

that the *ijazut-nama* adduced by the Respondent as having been executed by her husband, for the purpose of adoption, was not valid and admissible, in consequence of the Respondents being under age, (that is to say, that when it was written, her age was two years,) have on the first appearance some claim to consideration; yet when the matter was well sifted, these two objections did not appear to favour the pretensions of the Appellants, for apparently the *ikrar-nama* in question was drawn out at the time when *Huradhun* was dangerously ill, (so that he died a few days after,) by the hand of *Nub Kishore*, one of the *ryots* of *Dhurm Das*, and was signed in such extremity of sickness that his senses were materially injured. This leads to the suspicion, that he was not aware to what, or to what paper, he put his signature; hence the paper in question coming into existence is not free from doubt. With all this, if, agreeably to the allegation of Appellant's witnesses, it should be even held valid, nevertheless it cannot be deemed sufficient to reject the claim of the Respondent, and to annul the decision of the Provincial Court, for it is clear that a deponent can only depose to such matter as has actually occurred prior to the time of his deposition: contrary thereto is repugnant to fact, and inadmissible. In the present instance, this circumstance is sought in vain, that is to say, as by the testimony of witnesses and various documents, it is clear that *Huradhun's* claim to, and possession of, the property in dispute, existed up to the time of the execution of the *ikrar-nama*, how then, from the tenor of the *ikrar-nama*, can it be argued that he had no claim? A refutation of the second objection is completely met in the decision of this Court, dated 19th July 1832, in the case of

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1843. *Anund Mohun*, Appellant, v. *Huree Periah*, Respondent, which was passed agreeably to the *bewusta* of the *pundit* of this Court; consequently there appears no necessity for any other argument. Under all these circumstances, and the reasons detailed in the decision of the Provincial Court, the decision in question in every wise appears good and valid, and the objections of the Appellants thereto altogether inadmissible. It is therefore finally ordered and decreed, that the decision of the Provincial Court of *Moorshedabad*, dated 19th June 1829, be affirmed and ratified, and that the Decree of the Provincial Court be executed agreeably to what is stated therein, and the appeal dismissed with costs."

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The Appellant then, after praying for a review of Judgment, which was refused, appealed to His late Majesty in Council.

Mr. *Charles Buller*, Jun., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellants.

The property in question belongs entirely to the Appellants. Part of it was assigned to them for their individual benefit by *Nihal Chund Pandey* and *Huradhun Pandey*, and the remainder of such property was acquired by the Appellants by their own exertions, and not as an undivided family with the husband of the Respondent or any other person under or from whom the Respondent claims. It is true they may have constituted a joint family, but the property having been solely acquired, without employing for that purpose any part of common family property, became separate, and the Respondent has no right in law to participate therein. 1 *Strange's Hindoo Law*, 213, 214. There is moreover a fatal objection to the Respondent's

claim. In what capacity does she sue? She does not sue as the guardian of the adopted son. In the suit she claimed to be the heiress of *Huradhun Pandey*, but adduced evidence upon which the Court declared another person to be his heir; and the Court in direct opposition to such evidence, and its own declaration, decreed to the Respondent the same share of the property of her deceased husband, to which she would have been entitled if her claim had been proved. At the time of the death of *Huradhun Pandey*, the Respondent was a childless widow, and only entitled to a life estate. *Keerut Sing v. Koolahul Sing* (a). 1 *W. Macnaghten's Hindoo Law*, 19. 1 *Strange's Hindoo Law*, 121, 134. The moment the adoption took place, she cut down her life estate, and became only entitled to maintenance. 1 *W. Macnaghten's Hindoo Law*, 70. As, therefore, the evidence adduced by the Respondent made out a case which completely superseded the claim set forth in her pleadings, the plaint ought to have been dismissed with costs. The mode in which the account is taken is unjust. No evidence whatever was given of the amount of cash belonging to the family at the death of the Respondent's husband, which the Provincial Court assumed to be very large. An account should have been directed.

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Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

It was established by the evidence that the four brothers, and, after the death of *Suroop Pandey*, the Respondent's husband, were an undivided Hindoo family, and lived in commensality and joint partner-

(a) 2 *Moore's Ind. App. Cases*, 331.

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ship ; that no separation ever took place between them ; and that the property which formed the subject of the suit was joint family property, to which the members of the family were respectively entitled as co-sharers. The presumption of law then is, that all the property was jointly acquired. By the Hindoo Law, the Respondent was entitled as the widow of *Huradhun Pandey*, who died without issue, to his share of the joint family property, and she has adopted a son, pursuant to a command and authority in writing duly given by her husband for that purpose. She then became his guardian and trustee. This Court, as in the House of Lords, will never interfere for the purpose of setting aside the proceedings of the Court below on a mere technical informality where substantial justice has been done, and this principle has been applied to Indian cases. *Khoorshed-jee Manik-jee v. Mehrwan-jee Khoorshed-jee*(a). *Ghirdharee Sing v. Koolahul Sing*(b). The *ikrar-nama* alleged by the Defendants to have been executed by *Huradhun Pandey* was a fabricated instrument, and conferred no right upon *Dhurm Das Pandey*, in whose favour it purported to have been made. *Bengal Reg. XX. of 1812.*

LORD CAMPBELL:

Their Lordships feel very much indebted to the Gentlemen of the Bar, on both sides, for the manner in which this case has been argued. It has been argued with the greatest ability and with great conciseness ; and I must say that we are better assisted by the Bar when a case is so argued, than when the arguments are extended to an unnecessary length, and there are repeti-

(a) 1 Moore's Ind. App. Cases, 442.

(b) 2 Moore's Ind. App. Cases, 344.

tions, which only perplex us. I am sure nothing was omitted on either side, that could assist or be of service to their clients.

This case is of a very intricate and perplexing nature, and it is utterly impossible to explain all the facts that appear in evidence before us. But we have the Judgment of the *Zilla* Court, which appears to me to be framed with great care and caution, and I am glad to have an opportunity of saying so, because lately in another case (the case respecting the palanquin), I felt it my duty to declare the regret of all their Lordships who heard the case, that much pains had not been bestowed upon it either by the *Zilla* or the *Sudder Dewanny* Court. In this case it appears to me, and I believe to all their Lordships, that both in the *Zilla* Court and in the *Sudder Dewanny Adawlut* the Judges have shown great industry, great circumspection, and great discrimination.

Now the case really involves merely a question of fact. There is no disputed point of law that occurs in the case, and upon a question of fact we must give credit to the judgment of the Court below, the Judge having an opportunity of seeing the witnesses and of seeing the documents, and being better acquainted with the habits and customs of the people than we can be supposed to be.

The Judgment of the *Zilla* Court in this case has been affirmed by the *Sudder Dewanny Adawlut*. The Judge of the superior Court not in all respects taking exactly the same view as the Judge of the inferior Court, but confirming the Decree of the inferior Court ; we have to determine whether that Decree ought to be affirmed or reversed ; and after the most anxious consideration, their Lordships are of opinion that the

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It is allowed that this was a family who lived in commensality, eating together, and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is, that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property. Such evidence may be received, but their Lordships are of opinion that such evidence has not been given in this case, with regard to any part of the property.

Now what has been relied upon, with regard to a portion of the property, has been chiefly that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it ; but all that is perfectly consistent with the notion of its having been joint property, and even if it had been joint property it still would have been treated exactly in the same manner. We have heard from the highest authority, from the authority of Sir *Edward East* and Sir *Edward Ryan*, whose most valuable assistance we have in this case, (and it gives me a confidence that I should not otherwise have felt,) that the criterion in these cases in *India*, is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the Appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid ; therefore, I think, that so far on this part of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property.

That being so, the widow is entitled to a third of that joint property unless credit be given to the *ikrar-nama* which has been set up by the other side. The Judge of the *Zilla* Court, who must have seen it, who must have examined it, and who had an opportunity of seeing the witnesses by whom it was supported, and the witnesses by whose evidence the authenticity of it was impeached, came to the conclusion that it was a fabrication. The Judge of the *Sudder* Court was rather of opinion that it bore the seal or signature of the grantor, but that it had been obtained from him when he was incompetent to execute a Deed. I must for my own part express, that the leaning of my opinion is rather in accordance with that of the Judge of the *Zilla* Court. But at all events, it seems to me that this is a Deed to which no faith can be given, and that the two Courts were perfectly right in considering that it was not the Deed of the grantor, and that it ought not to have any weight given to it.

We now come, therefore, to the question of *quantum*. Their Lordships are of opinion that the whole of the real property must be considered as joint property, and the same as to the personal property, because according to the Law of the Hindoos, as in the Civil Law, no distinction is made between these two species of property. Their Lordships certainly have felt great difficulty respecting the amount of personal property—the cash supposed to be in the house—and it would have been satisfactory to them, if, according to the course of proceeding in this country, a reference could have been made by the Court below to ascertain the amount. But we have reason to believe that such a reference could not have been made, and now, at this distance of time, it could not possibly be made with any advantage.

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To show the amount, there is a document produced, which, if genuine, is sufficient for the purpose,—an inventory, supposed to have been acknowledged by one of the parties against his own interest. The Judge of the *Zilla* Court and the Judge of the *Sudder* Court have both concurred in believing that to be a genuine instrument, acknowledged by the party. There is no doubt that is subject to some suspicion, but we do not feel that we should be at all justified in saying that the Judge of the *Zilla* Court and the Judge of the *Sudder* Court came to a wrong conclusion. We feel ourselves bound, likewise, to consider that a genuine document, and if so, it proves the amount of the property to be according to that stated in the Decree.

An objection has been made, that, pending the suit, an act of adoption was executed by the Respondent, whereby the whole property was divested from the mother and vested in her adopted son. . Now, upon the authorities there can be no doubt that that is the result of an act of adoption, because the property is in the widow, from the death of the husband, till the power of adoption is exercised. Then that adoption divests it from the widow, and vests it in the adopted son. But for that reason are we to reverse the Decrees of the two Courts? No objection was made in either of those Courts that the proper parties were not before the Court. If such an objection had been made, it might have been removed, and I think it is a safe maxim for a Court of Appeal to be governed by—that an objection, which, if taken, might have been cured, and which has not been taken in the Court below, shall not be taken in the Court of Appeal.

We consider that the Judges of the two Courts below were right in coming to the conclusion, that the

ijazut-nama, or deed giving the power of adoption, was a genuine deed. The witnesses who were examined to prove its validity were believed by the Judges below, and we see no sufficient reason why they should be disbelieved by us. That, therefore, being a genuine instrument, there was a power of adoption, and it is always to be borne in mind that that deed goes along with the habits and feelings of the Hindoos, because we know that a Hindoo dying without issue male, would be most anxious before his death, by writing or by parol, to give a power of adoption, in order that the sacrifices which are required may be performed, and that his departed spirit may be introduced to a state of happiness.

Then, under these circumstances, what is the effect of the Decree? It has been objected that the effect of the Decree is to put the Respondent in possession, in her own right, of that which is divested from her by the act of adoption; but their Lordships conceive that, although the Decree is not very skilfully framed in that respect, that is not the effect of it. All the facts being stated, it is assumed as matter of law, that, after she had executed the act of adoption, she prosecuted the suit only as guardian of her adopted son. Then, as the suit must be considered as afterwards prosecuted by her, in her name, for his benefit, the Decree must be considered to be for his benefit, and that she is put in possession as trustee for him. He claimed, as I understand, an undivided share; she is to be put into possession of an undivided share. That share she will hold accountable to him as his guardian and trustee, being entitled herself to a maintenance out of it. Some of their Lordships thought that it might be expedient to alter the Decree with relation to that

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point. But upon the whole, after considering the matter more maturely, their Lordships are of opinion that it is unnecessary—that the effect of the Decree will be to consider the whole of this property as joint property—that this deed, giving the power of adoption, the *ijazut-nama*—is a genuine instrument, that she prosecuted the suit as guardian for her adopted son, and that, therefore, he will be entitled to call upon her to account for the profits of the joint property of which she is to be put in possession.

Under these circumstances, their Lordships are of opinion, that it will be proper to recommend to Her Majesty that the Decrees of the Courts below be affirmed, and with costs. There are doubts upon the facts, but we are proceeding upon the ground that a forged instrument was given in evidence on the part of the Appellants, that that has caused the litigation, and that there is no reason why in this case we should depart from the common rule, that the Appellant failing must pay the costs of the Appeal.

JESWUNT SING-JEE UBBY SING-JEE }
 and CHUTER SING-JEE DEEP SING- }
 JEE - - - - - } *Appellants,*

AND

JET SING-JEE UBBY SING-JEE - - - *Respondent.**

*On Appeal from the Sudder Dewanny Adawlut of
 Bombay.*

*Mahomedan Law—Legitimacy—Child born in wedlock—Presumption—
 Deed—Construction—Deed by Mahomedan “adopting a person to suc-
 ceed to my property”—Validity—Gift—Will—Essentials of.*

By the Mahomedan Law, a child born in wedlock is presumed to be the child of the father; legitimacy following the marriage bed.

A Mahomedan by Deed, declared that he had adopted a son “who was to succeed to his property and title.” Held on Appeal, to be inoperative and void, either as a Deed of Gift, or as a testamentary disposition, no delivery of possession and relinquishment by the donor or seisin by the donee having taken place.

Under an order of reference, the Judicial Committee of the Privy Council, upon an Appeal coming before them, remitted the case, by reason of the rejection of certain evidence, to the Court below, with directions to take the evidence rejected. The Court in *India*, upon the remit, examined such of the witnesses before tendered as were produced, but made no adjudication in the cause, and transmitted the further evidence to *England*. No fresh order of reference was made to the Judicial Committee. Upon the Appeal, with the further evidence, coming before them, their Lordships, under the circumstances, were of opinion that they had no jurisdiction to entertain the case; the original order of reference having been exhausted by the remit.

But upon a Special Petition for such purpose (all parties consenting) the Order in Council directing the remit to *India* was varied and amended, by being made a mere reference to the *Sudder Dewanny Adawlut* to take evidence, without throwing any duty upon that court to re-consider or adjudicate upon the cause, but to remit the same, for the consideration of the Lords of the Committee.

THIS suit respected the right of inheritance to certain portions of the revenue of the villages in the *pergunna* of *Amod*, and other hereditary property, formerly belonging to the *Raja* of *Amod*, *Khan Saheb*, or *Ubbu Sing*, the father of the present Respondent.

5th Feb.
 1844.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—Assessor,—Sir E. Ryan.

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In the year 1865 (A.D. 1808-9) *Purtaba*, one of the wives of the *Raja Ubbi Sing-jee*, having left *Amod*, where her husband resided, and taken up her residence at *Baroda*, gave birth to the Respondent.

The *Raja* recognised and acknowledged the child of *Purtaba* as his offspring, and provided for it by making *Purtaba*, although living separate from him, a regular allowance for her own and her child's maintenance during his life.

In 1814 the *Raja* died, whereupon *Purtaba's* child, *Jet Sing*, being the only son of the *Raja*, became entitled by the Mahomedan Law to the *guddy* and *zemindary* of *pergunna Amod*, and all his property of every description.

Jeswunt Sing, the son of *Chatur Sing*, the late *Raja's* youngest brother, however, claimed to be entitled to the property of the deceased *Raja*, by virtue of an alleged deed of adoption ; and *Chatur Sing* and *Jeswunt Sing*, combining with *Gulaba*, one of the late *Raja's* wives, took possession of the whole of the *Raja's* property.

In consequence of these proceedings, *Purtaba* filed her plaint, as the guardian of *Jet Sing*, in the *Zilla Court of Broach* on the 20th of *June* 1825, to recover the possession of the *zemindary* and other property of the late *Raja*, laying her action at the sum of 4,02,741 rupees, being ten times the amount of the annual income.

On the 5th of *December* 1825, the three Defendants, *Chatur Sing*, *Jeswunt Sing*, and *Gulaba*, put in their answers, in which they insisted on the adoption of *Jeswunt Sing* by the late *Raja*, and asserted that the Plaintiff, *Jet Sing*, was not the son of the *Raja*, and had been repudiated by him in his lifetime, and,

therefore, could not be his heir or entitled to succeed to the inheritance of the *zemindary*.

The Plaintiff, *Jet Sing*, having replied, and the Defendants rejoined, documentary and oral evidence was produced on both sides.

On the part of the Plaintiffs, a deed of assignment bearing date the 10th of *March* 1817, of a village called *Wadea*, to *Purtaba* and her son, for their maintenance and support, which contained a clear recognition by the *Raja*, of *Jet Sing*, as his son, was proved. They put in also a letter from the late *Raja*, of the 25th of *April* 1816, addressed to *Jet Sing* as his son, and a power granted to *Purtaba* and *Jet Sing*, by the *Raja*, to manage his affairs. They also produced a variety of witnesses to prove the birth and naming of *Jet Sing*, and the acknowledgment of him by the *Raja*.

The Defendants (the present Appellants) put in the alleged deed of adoption of *Jeswunt Sing*, which was dated the 26th *December* 1821, and purported to be a repudiation of his wife *Purtaba* and his son *Jet Sing*, and a declaration of the illegitimacy of the latter, as the ground for the adoption of his nephew *Jeswunt Sing*, the son of his youngest brother *Chatur Sing*. The Defendants, *Jeswunt Sing* and *Chatur Sing*, also examined various witnesses, none of whom, however, deposed to any specific act on the part of the *Raja*, by which *Jet Sing* was disowned, except the deed in question.

On the 22nd of *August* 1826 the cause came on for judgment before the *Zilla* Court, when, after going through all the proceedings and evidence, the Court observed, that "after a most attentive perusal of the whole of the documents filed and evidence taken in

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1843-4. this case, it was quite satisfied that the Plaintiff (the
 JESWUNT present Respondent) had proved his claim to the
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 UBBY SING- *guddy* of *Amod*;" the Judge, Mr. *Edward Grant*,
 JEE adding that, "independent of the evidence and docu-
 z.
 JET SING-JEE ments produced by Plaintiff, the strong resemblance
 UBBY SING- that *Jet Sing* bore to his deceased father, the lat-
 JEE. ter of whom was personally known to that Judge
 when alive, was so great as to leave no doubt in
 the mind of the Court as to his being his legitimate
 son." It was therefore decreed, that the Plaintiff be
 put in full possession of the whole of the property
 of his deceased father *Ubbby Sing*, which was in the
 possession of the Defendants, the parties bearing their
 own costs of suit.

From this Decree, the Defendants appealed to the
Sudder Dewanny Court of *Bombay*.

On the 31st of *March* 1827, the cause having come
 on for hearing before the *Sudder Court*, the following
 questions were stated by that Court for the opinion
 of the Mahomedan law-officer:—

Question.—“Can a man having a son leave his
 property to his brother's son during the lifetime of
 that brother, and would such an act deprive a son of
 all participation in the father's property? Does it
 appear from the tenor of the *sunud* (the alleged deed
 of adoption) now shown to you, that all the property
 has been given away; and in such case, is it proper
 according to the Mahomedan Law, or not?”

Answer.—“It is declared according to the Maho-
 medan Law, that any man having a son can give away
 his property to any one he pleases, whether he be a
 nephew or any other person, and in consequence of his
 (the person to whom the property is given) being made
 proprietor, the son of the donor is deprived of every

thing except the right of consanguinity. I have examined the *sunud*. If the donor has given away the property and the receiver has taken possession of it, it is correct and proper; for so it is written in the chapter of Free Gifts in *Hedgia*, and in other books.—*Mahomed Kazi*.”

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After this opinion, the Court placing the *sunud* in the same law-officer's hand, put to him the following question concerning it:—

Question.—“In the accompanying *sunud* it is thus stated by *Ubby Sing*, ‘the woman, *Maha Rany Purtaba*, having brought *Jet Sing*, the son of some unknown person, I on that account disown him as my offspring;’ but it is proved in evidence that *Ubby Sing* was persuaded to make such a declaration contrary to the truth, for *Jet Sing* is the son of *Ubby Sing*. In that *sunud* a gift is mentioned, but no property specified, whether in general or detail, neither has the donee's acceptance of the gift been proved. Further, *Jeswunt Sing*, the Appellant, has not proved that *Ubby Sing*, having divested himself of the property, agreeably to the terms of the *sunud*, put Appellant in possession of it agreeably to the Mahomedan Law; therefore, would it be proper to act upon such an imperfect *sunud*?”

Answer.—“Agreeably to the Mahomedan Law, we state, that as the declaration made by *Ubby Sing*, denying that *Jet Sing* was his son, has been proved to be false, and it has also been proved that he (*Jet Sing*) is the lawful son of *Ubby Sing*, the above-mentioned written declaration is invalid. As long as *Purtaba* remained lawfully wedded to *Ubby Sing*, his denying the descent of her son from him, and disowning him as his offspring, would not be admitted; for by our law, ‘the offspring follows the bed,’ and the connexion of the

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marriage bed is legal and firm; and since perfect possession and acknowledgment by the donee of what has been given, whereby the gift would have been perfected, has not been proved, therefore the said gift, according to law, is not correct, then no force can be given to such an imperfect writing. Moreover, from the sense of the law authorities, as the *Hidaya* and others, on the subject of genealogy and gift, it is manifest and apparent.”

On the 23rd of *June* 1827 the *Sudder Adawlut*, having duly considered all the proceedings in the appeal, after reference to the Mahomedan law-officers, found that the instrument of adoption was invalid and ineffectual: first, in respect to the declaration therein made by *Ubbby Sing*, denying to *Jet Sing* the character of his son, having been negatived by the Court, finding that the said *Jet Sing* was the true and lawful son of the said *Ubbby Sing*, as it was in proof, from the personal knowledge of the *Zilla* Judge originally trying the case, that the son, *Jet Sing*, bears the strongest resemblance to his father, and this was not a son suddenly brought forward as just found, but of a boy from his birth claiming and passing as the son of *Ubbby Sing*; secondly, on the ground of it being incompetent to a father, by the Mahomedan Law, to declare a son spurious, born of a wife not previously divorced; and thirdly, because there being no proof of seisin of the property by the Appellant, said to have been given to him by the late *Ubbby Sing*, nor of relinquishment of it by the said *Ubbby Sing*, so as to constitute a valid and lawful gift. Accordingly, the Court affirmed the Decree of the *Zilla* Judge of *Broach*, of the 22nd of *August* 1826, with costs.

From this Decree, the Appellants appealed to His late Majesty in Council.

When the Appeal came on for hearing, their Lordships were of opinion that the cause ought to be sent back to the *Sudder Dewanny Adawlut*, to hear certain witnesses tendered on behalf of the Appellants (a) and rejected by that Court; and the cause having been re-mitted, the *Sudder Dewanny Adawlut* at *Bombay*, by an Order bearing date the 12th of *June* 1841, directed the *Zilla* Court of *Surat* to take the evidence, (to receive which application was formerly made,) agreeably to the Order of Her Majesty in Council, notice being given to the opposite party to afford him an opportunity of rebutting the same if able.

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In pursuance of this Order, the *Zilla* Court proceeded to take the evidence of such of the witnesses as were tendered, and after allowing four months for the production of the witnesses, forwarded the depositions thus taken to the *Sudder Dewanny Adawlut*, and the same were transmitted by the Court, without any adjudication upon the case, in consequence of the fresh evidence, to Her Majesty in Council.

Upon the Appeal, with this additional evidence, coming on for hearing, their Lordships stopped the Appellants' Counsel from arguing the case; the opinion of the Committee being thus expressed by

2nd Dec.
1843.*

The Right Hon. Dr. LUSHINGTON:

There is necessarily in this case a preliminary consideration whether their Lordships have any authority

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

(a) Reported on this point, 2 Moore's Ind. App. Cases, 424.

1843-4. to hear the present proceedings, or whether any con-
 JESWUNT sent given by the Counsel on both sides will enable
 SING-JEE them to administer justice in the case. Their Lord-
 UBBY SING- ships greatly regret that it is their opinion that they
 JEE are unable to proceed at all, and for the reasons which
 v. I am now about to state.
 ET SING-JEE
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When this case came under their Lordships' consideration, in pursuance of the original reference from Her Majesty in Council, their Lordships, who then sat, were of opinion that it was necessary that the case should be sent back to the Court below, in consequence of that Court having taken upon itself to refuse the examination of several witnesses who were tendered upon no justifiable ground. Having come to that opinion, their Lordships reported to Her Majesty, "That the cause appealed from the Court of *Sudder Dewanny Adawlut* ought to be remitted back to the said Court, on the ground of the refusal of the Court below to hear certain witnesses on behalf of the Appellants in the said cause, and that the said Court of *Sudder Dewanny Adawlut* ought to be directed to proceed therein accordingly."

Now we are of opinion, that when that Judgment was pronounced and affirmed, as it was by Her Majesty in Council, the original reference of the Appeal to this Court was entirely exhausted, and that our authority was completely at an end. But how did the Court below proceed? They remitted the case to the *Zilla* Court at *Surat*, with directions to examine the witnesses in the case, and that Court accordingly made an order for the production of the witnesses, proposing to the other party to give them an opportunity of rebutting the additional evidence if such an opportunity could be embraced. It does not appear that the opportunity so given was taken advantage of, and the

Zilla Court having transmitted the evidence so taken, to the *Sudder* Court, that Court, without any adjudication, sends the case directly up to this Court for consideration.

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Now, what possible jurisdiction can their Lordships have. There is no reference by the Queen in Council subsequent to the Order in Council of the 25th of *January* 1841, remitting the case to the Court below. What ought to have been done is this:—After hearing the evidence on the one side, or on both sides, which had been offered, the case ought to have been decided, and if either of the parties were dissatisfied with the decision, there ought to have been a fresh Appeal, and the case ought to have been brought under consideration in the usual and ordinary manner. But as it now stands, we have no authority under the original reference, and we have no second reference. Consequently, we have no jurisdiction at all, and having no jurisdiction, consent cannot confer it; and any attempt, of course, to pronounce a judgment, never could be followed up by Her Majesty in Council by a valid Order. We exceedingly regret, for the interest of the parties, that such a state of things has occurred, but we cannot proceed in this case.

2.
JET SING-JEE
UBBY SING-
JEE.

In consequence of the opinion thus expressed by their Lordships, of their inability to entertain the Appeal, a petition was presented by the Appellants, which, after setting forth the above facts, prayed that Her Majesty in Council would be pleased to take their said Appeal, together with the depositions aforesaid, into Her most

15th Dec.
1843.*

* Present: Members of the *Judicial Committee*,—Lord Campbell, the Vice-Chancellor Knight Bruce, the Right Hon. Sir H. Jenner Fust, and the Right Hon. Dr. Lushington.

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gracious consideration. And that the said Decree of the 23rd of *June* 1827 might be reversed, altered, or varied, Or that Her Majesty in Council would be pleased to direct the said *Sudder Dewanny Adawlut* to re-hear the said cause, and upon such re-hearing to take the depositions aforesaid into their considerations, and adjudicate thereupon.

Mr. *Jackson* supported the Petition; and

Mr. *Edmund F. Moore* appeared for the Respondent,

And expressed himself ready to consent to any course their Lordships felt they could adopt to ensure the speedy hearing of the case.

The cases of *Rajunder Narain Rae v. Bijia Govind Sing (a)*, and *Sree Mutty Bissoonderry Dabee v. Rajah Burrodacaunt Roy (b)*, were referred to.

LORD CAMPBELL:

All parties consenting, we think that the Order of the 25th of *January* may be varied, for the purpose of making it an Order merely to take fresh evidence, and to remit the evidence to this Court, and that Order being varied, the irregularity will be entirely cured, and we can hear you strictly under the Act of Parliament.

Upon this Petition, their Lordships reported to Her Majesty as their opinion (the express consent of the parties on both sides having been given to that effect), that Her Majesty's Order in Council of the 25th *January* 1841, whereby it was ordered that the said cause

(a) 2 Moore's Ind. App. Cases, 181.

(b) 2 Moore's Ind. App. Cases, 127.

be remitted back to the *Sudder Dewanny Adawlut*, ought to be varied, and that it ought to be declared that the said *Sudder Dewanny Adawlut* ought only have been directed to admit the evidence of the said witnesses in the said petition mentioned, the same to be remitted for the consideration of the Lords of the Committee, together with the evidence before taken in the said cause, without setting aside the final Decree of the *Sudder Dewanny Adawlut* appealed against, throwing any duty upon the said Court to reconsider or re-adjudicate upon the said cause. And in case Her Majesty was pleased to order that the said Decree of the 25th of *January* 1841 be so varied, and do stand varied accordingly, then their Lordships are of opinion that the depositions of the witnesses examined by the *Zilla* Court in pursuance of an Order of the *Sudder Dewanny Adawlut* of the 12th of *July*, 1842, ought now to be received as evidence in this cause. And that Her Majesty should be recommended to direct their Lordships of this Committee to proceed with the hearing of the Appeal against the said Decree, together with the depositions aforesaid, and to report their opinion upon the said final Decree of the *Sudder Dewanny Adawlut*, to Her Majesty.

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The above report was duly confirmed by an Order in Council, bearing date the 31st of *January* 1844.

The Appeal now came on for hearing, upon the evidence taken by the Court in *India* upon the remit, in conjunction with the former evidence.

5th Feb.
1844.

The questions raised and argued were, *first*, whether it was proved by the evidence that the Respondent was the son of the deceased *Raja Ubbay Sing-jee Deep Sing-jee*; and, *secondly*, if the instrument under which

1843-4. the Appellants claimed, and which they insisted operated so as legally to disinherit the Respondent in the event of his being proved the *Raja's* son, was valid and operative by the Mahomedan Law, either as a deed of gift, or a deed of adoption and testamentary disposition. *Macnaghten's* Principles of the Mahomedan Law, 50, 51, 124, 242-3, were referred to.

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Mr. *Charles Buller*, Mr. *Jackson*, and Mr. *Forsyth*,
for the Appellants; and

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr.
Edmund F. Moore, for the Respondent.

LORD LANGDALE:

This case comes on upon an appeal from the Court of *Sudder Dewanny* at *Bombay*.

The Appellant states in his *Plaint*, that he was entitled to the property in question, in one form or another, as the adopted heir of *Raja Ubbby Sing-jee*, who died in the year 1825. The Respondent alleges himself to be the heir of the same person, and as such entitled to the property in question.

The claim of the Appellant rests altogether upon the validity of a Deed which is stated to bear date on the 26th of *December* 1821, and which is alleged to be an effectual Deed of gift to him, of the property in question. It is also alleged on the part of the Appellant, that if it is not to be considered as a Deed of Gift, it is to be regarded as a Will, under which he is entitled; if the Respondent be not the heir to the whole of the property, or at all events to one third of it. It is, therefore, of the utmost importance to see what is the nature and effect of this Deed; it is dated the 26th of *December* 1821, and is signed by *Ubbby Sing-*

jee, *Deep Sing-jee*. The Deed is short, and is in the following words:—"As I have divorced my wife, her son, *Jet Sing*, by illicit intercourse, is hereby disinherited. I have, therefore, adopted you." Then there follows after the signature these words:—"I have adopted *Rana Jeswunt Sing* to succeed to my property and title—no one shall interfere in this adoption. I have also made provision for all my wives, by assigning a portion of land for their maintenance—they shall not be annoyed in any way, but considered as the mothers of *Jeswunt Sing*, and so treated and maintained. I have no son, and the heir to the estate is my brother *Rana Chuter Sing*, whose son, *Jeswunt Sing*, I have adopted."

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The first question to be considered is, whether this is a Deed of Gift which passes any property to the Appellant, *Jeswunt Sing*; and that depends upon these words—"I have adopted *Rana Jeswunt Sing* to succeed to my property and title:" and upon this subject their Lordships have been referred to *Macnaghten's* book as to what is the meaning of a Deed of Gift; in which it is stated, "It is requisite that a gift should be accompanied by delivery of possession, and that seisin should take effect immediately, or, if at a subsequent period, by desire of the donor." (P. 50.)—"A gift cannot be implied, it must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it." (P. 51.)

Now, in the first place, their Lordships feel great difficulty in saying that any gift absolutely was here intended: the words are, "I have adopted *Rana Jeswunt Sing* to succeed to my property." When is he to

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succeed? After his death. Where is the relinquish-
 ment or any giving up of the property? There is
 none. If these words were intended to pass the pro-
 perty, there is a complete absence of any relinquish-
 ment by the donor, or of seisin by the donee, and,
 therefore, it appears to their Lordships that this instru-
 ment is not to be treated as a Deed of Gift.

Then arises the question, Is it a Will? We have
 again the same absence of his intention to give, in
 words. He says he has no son, and he adopts some-
 body who may succeed. His son may succeed—any
 other person may succeed—if it is in the nature of a
 testamentary gift.

This case seems to be in the very terms of it almost
 similar to a case cited from page 124 of *Mac-
 naghten's* book; where the question was as to the effect
 of a document executed by a party declaring his
 nephew to be his representative in proprietary right.
 The answer declares “the document to be of no
 validity, and cannot be available to confer any right of
 succession on the nephew, because it purports to con-
 stitute him the representative in proprietary right of
 the framer of it; in other words, it declares him in
 general terms to have the right to the entire property
 belonging to the framer of the document after the
 death of the latter,” which is the only construction to
 be given to the words used here—“I have adopted
Jeswunt Sing to succeed to my property.” It then
 goes on to say, “Such a declaration does not fall within
 any description of legal obligation, and has, therefore,
 no validity as to the creation of proprietary right.”
 This, therefore, is not a Deed of Gift, nor a testa-
 mentary gift to take effect after the death of the donor.
 It appears to their Lordships, therefore, that this docu-

ment has no effect or operation whatever in giving any right of property to *Jeswunt Sing*.

That being so, *Jeswunt Sing* has no right on which he can recover anything; but with a view to what is ultimately to be done in this case, it is necessary to consider the matter a little further.

This case is brought forward either upon the allegation that the Defendant was a supposititious child, palmed upon her husband by *Purtaba*, pretending to be his mother, for the purpose of obtaining the property, or else upon the allegation that the child of *Purtaba* was an illegitimate child, born by illicit intercourse with some other person than the husband *Raja-Ubby Sing*.

Now, with respect to the question whether, being supposed to be the child of *Purtaba*, he was also the child of *Ubby Sing*, there has been a great deal of evidence gone into, contradictory in some parts of it, but which, quite independent of the conclusion of law, preponderates very greatly in favour of his being the child of *Ubby Sing*, and as such recognized by him. Independently of that, there was no denial that *Purtaba* was the wife of *Ubby Sing*, and there is no evidence which can be relied upon to show that the most ordinary presumption ought not to prevail in this case. This is a case of a child born in wedlock, and it must, therefore, be deemed to be the child of the husband.

The other part of the case, which supposes that this child is not the child of *Purtaba*, does, upon examination of the evidence produced, appear to us to be a gross attempt at fraud and imposition. There is no evidence which can in the smallest degree be relied upon, to support such a statement. The declaration of the husband in the instrument produced as the foundation of the Appellant's claim negatives such an

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 assumption, for he there speaks of him as "her son *Jet Sing* by illicit intercourse," and though that declaration may not be a true declaration, as to the allegation of illicit intercourse, it is conclusive against the supposition advanced by the Appellants, of the child being supposititious; there is not the least foundation laid for it, and nothing which can lead us to suppose why he should be induced to put forward such a case, evidently false, and having no foundation whatever.

It is not possible, however, to dispose of this case without making one observation at least upon the proceedings which have taken place. In the *Zilla* Court, where evidence was brought forward to a very great extent, it appears that the Judge so far forget that it was necessary to have the evidence brought forward, under legal sanction, and in public, in such a way that there might be the means of controverting it, imported, as a ground of his decision, something which came within his own knowledge. It is to be regretted that any such circumstance should have taken place, and, still more, it is to be regretted, when the case came before the superior Court, the *Sudder Dewanny Adawlut*, that a circumstance of that kind should have been alluded to as one which ought in the smallest degree to have any effect upon the Judgment of the Court. It is impossible to pass that by without making an observation upon it, but still the other circumstances of the case are so clear, that their Lordships see no reason why the decision which has been come to should in any respect be altered. That circumstance, if at all looked at, might have been worthy of further consideration in another respect, if the case had not the character which it must be supposed to have, of a fraudulent attempt to defeat justice; and considering the decisions which have been pronounced, and the

conduct which has been pursued by the Appellants, their Lordships are of opinion that the Appeal ought to be dismissed with costs, including all the costs below.

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MAHA-RAJA TEJ CHUND BAHADUR - - Appellant,

AND

SRI KANTH GHOSE and others - - Respondents.*

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Lease for term of years—Death of tenant before expiry of term—If terminates lease.

A lease for seven years of a farmed *pergunna* in *Bengal*, was granted by the *Raja* of *Burdwan*. The lease was not executed in writing, but the terms of holding were defined by a notice sent by the *Raja* to the tenants of the premises. The lessee died before the termination of the demised term, when the lessor evicted the lessee's representatives and granted a fresh lease to another at an increased rent. Held, in a suit brought by the representatives of the lessee to recover compensation for loss of profits, that the act of dispossession was wrongful, the remainder of the term by the Hindoo Law surviving to the heirs and representatives of the deceased lessee, and damages to be paid by the lessor, calculated upon the increased rental, awarded.

THE question in this case was, whether the representatives of a deceased lessee, under a demise for seven years, who died before the expiration of the term, had any interest in the unexpired remainder of the lease.

8th Feb.
1844.

The Appellant was the *zemindar* of *Chukla Burdwan*, in the district of *Moorshedabad*, which, among various other lands, comprised the *pergunna* of *Munohur-Shahi*. On the 2nd of *Bysack*, 1210, B.S. (13th of *April* 1803), he granted a lease of the *pergunna*, comprising 206 *mouzas*, being one of the *mahals* or districts of his *ze-*

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—Assessor,—Sir E. Ryan, Knt.

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mindary, to *Ram Nidhee Ghose*, to hold as *ijara-dar* or farmer for seven years, at one annual *jumma* or revenue of Rs. 1,09,937. 6 a. 7 p., and thereupon *Ram Nidhee Ghose*, the lessee, executed a security-bond of even date, the conditions of which, besides providing for the due payment of the *malguzary* in case of the death of the lessee during the term of the demise, were as follows :—" That after the expiration of the period of paying the *kist* on whatever balance there may be, I will, without fail, pay interest at the rate of one rupee *per cent. per mensem* ; and in case of a default in the payment of the *malguzary*, the *Maha-raja* in question may, at his option, dispose of the whole of my property and pay himself ; for such act of sale I shall have no remedy at law. Notwithstanding such sale, should the balances be not liquidated, the *Maha-raja* may depute a *tahsildar* to the *mahal*, and exact payment of the balance. Should a balance be demandable after a recourse to all these measures, he may form another settlement of the *mahal*, within the period of farm, and whatever loss may arise upon the *malguzary* from this measure within the period for which the farm has been granted, I will pay by instalments. Should the *ijara-dar* referred to, die or absent himself, these circumstances will not be available to me as excuses for the non-performances of these engagements ; nor will I urge as an excuse, that the *ijara-dar* has not put his signature to the statement of balances. I will liquidate the balances without making any excuse." To this bond, one *Kishen Kanth* was security. No formal lease was executed. On the same day the *Maha-raja* issued the following *ilam-nama*, or notice: "To the *kurmacharies* (accountants), *ryots*, *paiks* (officers of revenue), and *kotwals* (officers of police),

of the *pergunna Munohur-Shahi*, and the other *mouzas* and *mahals*. The *mahal* in question has been given in farm to *Ram Nidhee Ghose*, from 1210 to 1216, B.S. (1803-4 to 1809-10 A.D.), a period of seven years; he will receive petitions and *kabooliats*, and take possession, and transact business according to rule. You will attend upon him and cultivate the soil, pay the rent, render papers, and not act contrarily in any way.”

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By virtue of these instruments, *Ram Nidhee Ghose*, the *ijara-dar*, obtained possession of the farmed *mahal*, and for a period of four years, viz. from 1210 to 1213, B.S. (A.D. 1803-4 to 1806-7), paid *malguzary* to the *Maha-raja*, agreeably to his engagement.

Ram Nidhee Ghose died on the 11th of June 1807, leaving the Respondents, *Neel Kanth Ghose* and *Sri Kanth Ghose*, his two sons, him surviving. Shortly after the death of *Ram Nidhee Ghose*, the *Maha-raja*, notwithstanding the existing lease, and the security-bond of *Kishen Kanth* already referred to, and that the heirs of the deceased *ijara-dar* were ready to pay the *malguzary* and continue the lease, caused the *pergunna Munohur-Shahi* to be put up for sale by public auction, and the same was sold to *Suroop Chund* as a *mofussil putny talook* (or lease in perpetuity), for the sum of Rs. 70,000, subject to the payment of the annual *jumma* of Rs. 1,23,937. 6a. 7p., being an increase of Rs. 14,000 upon the annual *jumma* paid by the late *Ram Nidhee Ghose*.

Mutual contracts or *kabooliats* were entered into, both by the *Maha-raja* and *Suroop Chund*, for the payment of the renewed *malguzary kists* and other dues; *Suroop Chund* in his *kabooliat* covenanting as follows: “I will maintain all previous settled *moota-*

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jery mahals for the period of the farm, and receive *mal-guzary* for the same, and will take possession of all *mahals* which have not been settled in *katkina* and are held in *khas*." *Suroop Chund* took forcible possession of the *mahals* in question, ejecting *Neel Kanth Ghose* and *Sri Kanth Ghose* out of possession.

Neel Kanth Ghose and *Sri Kanth Ghose*, after applying to and requesting the *Maha-raja* and *Suroop Chund* to deliver up possession of the *mahals*, and to make restitution for the injuries done to them, on the 20th of *August* 1811 filed their plaint in the Provincial Court of *Moorshedabad* against *Suroop Chund Roy*, wherein, after stating the several circumstances above detailed, and that in consequence of the unjust proceedings on the part of *Suroop Chund* and the *Maha-raja*, they (the Plaintiffs) had not the means of paying the expenses of a suit for the whole of the profits then due to them, and had therefore brought their claim for Rs. 19,537, being the amount of the profits of the year 1214, B.S. (1807-8, A.D.), with interest thereon, up to the time of filing the plaint, at the rate of one *per cent. per mensem*, amounting to Rs. 7,814. 14a., making in the aggregate Rs. 27,351. 14a.

On the 17th of *April* 1812, *Suroop Chund Roy* put in his answer, wherein he admitted the several circumstances alleged in the plaint, but submitted that the claim of the Plaintiffs for the profits for one year only was contrary to the Regulations, and insisted that the Plaintiffs' claim, if any, was against the *Maha-raja*, and that the suit ought to have been instituted against him; the Defendant also insisted on his title and possession of the *pergunna* in question, by virtue of the lease granted to him by the *Maha-raja*. To this answer the Plaintiffs replied, and the Defendant rejoined.

The Defendant put in various documents, comprising, ^{1844.} among others, an *ishtar-nama* or notice alleged to have MAHA- RAJA TEJ CHUND been issued by the *Maha-raja*, summoning the heirs of v. SRI KANTH GHOSE and others. the deceased *Nidhee Ghose* to appear at his *cutcherry*, and give security for the *malguzary*, but which notice was not proved.

On the 10th of *May* 1814, the Provincial Court of *Moorshedabad* dismissed the suit by way of non-suit, on the ground that the Plaintiffs had divided the amount of their claim, by suing for one year's profits only of the *pergunna* in question, giving them at the same time liberty to sue for the whole amount of the profits of the three years.

From this decision the Plaintiffs appealed to the *Sudder Dewanny Adawlut* of *Bengal*, and on the 16th day of *May* 1819 that Court reversed the judgment of non-suit, and remitted the suit back to the Provincial Court, with liberty for the Plaintiffs to amend, by suing for the profits of the three years, and by supplemental plaint to make the *Maha-raja* a Defendant to the suit.

Pending the above appeal from the Provincial Court, and before the decision of the *Sudder Adawlut*, *Suroop Chund Roy* died, leaving *Radha Mohun Roy* and others, his heirs, surviving, who appeared and were duly admitted to prosecute the appeal.

In pursuance of the notice of the *Sudder Court* of 16th *May* 1819, the suit was restored by the Provincial Court, and placed in its former number on the file of that Court, and on the 6th of *June* 1819 *Neel Kanth Ghose* and *Sri Kanth Ghose* filed their amended and supplemental plaint against the *Maha-raja* and the representatives of *Suroop Chund Roy*, claiming, in addition to Rs. 27,351. 14a., the amount sued for by the original

1844. *MAHA-RAJA TEJ CHUND v. SRI KANTH GHOSE and others.* complaint, the sum of Rs. 89,770. 2a., the amount of the profits of the *pergunna* in question, for the years 1215-16, B.S. (A.D. 1809 and 1810), making in the whole the sum of Rs. 117,131. 16a.

To this amended and supplemental complaint, *Radha Mohun Roy*, the eldest son of the late *Suroop Chund Roy*, put in an answer on behalf of himself and the other representatives of *Suroop Chund*, and thereby, after alleging that the *Maha-raja* had full right and title to lease the *pergunna* in question by reason of the alleged default in the Plaintiff's non-appearance after notice at the *Maha-raja cutcherry*, insisted that the *Maha-raja*, as the proprietor of the soil, was alone liable, and that they, the Defendants, ought to be saved harmless. To this answer the Plaintiffs filed their replication.

In pursuance of the prayer of the amended and supplemental complaint, an *ittila-nama* or summons was issued and served on the *Maha-raja*, but he refused to answer the complaint, declaring that the responsibility attached to the *Mofussil dakhildars*, and that he had nothing to do with it.

On the part of the Plaintiffs, several documents were produced, proving various transactions in respect of the *pergunna*, by *Suroop Chund*; the Plaintiffs also produced the *malguzary* receipts of their father, *Ram Nidhee Ghose*, up to the period of his decease, and examined witnesses to prove that there was no arrear due from them to the *Maha-raja* at the time of his granting the lease to *Suroop Chund Roy*.

On the 11th September 1820 the Provincial Court pronounced judgment in the cause, and gave it as their opinion that, upon consideration, the Plaintiffs appeared to be entitled to recover the amount they had sued for, together with interest on the amount

profits of the farmed *mahal*, from 1214 to 1216, B.S. 1844.
 (1807-8-9-10, A.D.), from the Defendants, heirs of *Suroop Chund Roy*, deceased; and they conceived that the *Maha-raja* was absolved from, and clear of, the claim of the Plaintiffs, and accordingly decreed to that effect.

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The Defendants, the representatives of *Suroop Chund Roy*, appealed from the Decree to the *Sudder Dewanny Adawlut* of *Bengal*. Pending the appeal, *Neel Kanth Ghose* died, leaving *Muhendra Narain Ghose*, an infant, his son and heir, him surviving; and on the 7th of *August* 1828, *Sri Kanth Ghose*, the survivor of the original Plaintiffs, for himself and on behalf of the infant *Muhendra Narain Ghose*, put in his joint and separate answer to the appeal.

The cause came on for hearing on the 10th of *December* 1823, before *Courtney Smith*, Esq., the Second Judge of the *Sudder Adawlut*, who was of a contrary opinion to that of the Judge of the Provincial Court, and held that the representatives of *Suroop Chund Roy* were not liable to compensate the heirs of the late *ijara-dar* for the remaining term of their lease; he was also of opinion that the *Maha-raja* was not in fault, and that the Respondents had originally no right of action; and he, therefore, ordered that the Decree of the *Moorshedabad* and Provincial Court of Appeal of the 11th of *September* 1820 be reversed, and that the costs of both parties be borne by the Respondents; the cause was, however, ordered to be brought forward at a second sitting: accordingly, it was afterwards referred to *John Herbert Harington*, Esq., who concurred generally with Mr. *Courtney Smith* in his opinion, but conceived that it was expedient to issue a second *ittila-nama* to the *Maha-raja*, requiring him to answer the claim of the Respondents previous to pronouncing a final Decree.

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A second *ittila-nama* was, therefore, issued and served on the *Maha-raja*; the *Maha-raja* appeared to this second *ittila-nama*, and submitted his answer by way of a plea, wherein he contended that the representatives of the late *Suroop Chund Roy* were, by the proviso contained in the *kabooliat* executed by *Suroop Chund Roy*, liable to the Plaintiffs for the remaining period of the original lease, and that no responsibility in respect thereof attached to him, the *Maha-raja*. On the 16th of *March* 1824 the *Maha-raja* filed a supplemental reply, insisting on the same grounds as were contained in his plea.

The appeal cause was again brought before *John Herbert Harington, Esq.*, on the 8th of *March* 1824, who was of opinion that the *Maha-raja* was the party liable to make good the claims of the Respondent; but as in this opinion he differed from the opinion of *Courtney Smith, Esq.*, the Second Judge, he ordered the suit to be brought forward at the sitting of another Judge.

The proceedings were accordingly transferred to *John Ahmuty, Esq.*, another of the Judges of the *Sudder Court*, who agreed with *Mr. Harington*, that it was necessary to demand a plea from the *Maha-raja*, and having great doubts whether the *ishtar-nama* (or notice) calling the heirs of *Ram Nidhee Ghose* to appear had ever been issued as alleged, required evidence of that fact; various witnesses were accordingly produced by the *Maha-raja*, to prove the manner in which the notices were given, but the *Sudder Court* declared their testimony to be unsatisfactory, and rejected their evidence.

The cause was finally heard on the 29th of *September* 1825 before *Cuthbert Thornhill Sealy, Esq.*, who stated his concurrence in the opinion given by the

Acting Judge, and pronounced the ultimate Decree of the *Sudder* Court, whereby it was ordered “that the Decree of the Provincial Court for the division of *Moorshedabad*, dated the 11th of *September* 1820, A.D., be reversed; that the claim made against the heirs of *Suroop Chund Roy*, deceased, together with the order for the liquidation of the costs of suit connected with the Plaintiff’s claim, incurred both in the Provincial Court and in this Court, be dismissed; and that the costs of both Courts be made payable by the Respondents, and that the sum of Rs. 42,000, the amount principal on account of the enhanced *jumma* of Rs. 14,000, assented to by the *putny-dar*, from 1214 to 1216, B.S., the remaining period of the farm of *Ram Nidhee Ghose*, deceased, together with the same sum, viz. Rs. 42,000 more, on account of the interest up to the 9th of *June* 1819, A.D., the date on which the supplementary plaint was filed against the *Maha-raja*, agreeably to the permission of this Court, as also interest at the rate of one *per cent. per mensem*, on the sum of Rs. 42,000, the amount principal referred to, from the 9th of *June*, up to the period of payment of the principal sum, together with costs.”

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The *Maha-raja* having prayed for a review of the Judgment by the *Sudder* Court, which was refused, brought the present Appeal.

The Appellant submitted that the Decree was erroneous for the following reasons :—

I.—Because the *pergunna* was granted to *Ram Nidhee Ghose* in consideration of personal confidence in him, and the instrument of notification contained no words importing that his interest therein was to descend to his heirs or representatives ; and the same, according to the Hindoo Law, did not, in fact, descend to them.

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II.—Because if the heirs of *Ram Nidhee Ghose* had any interest in the *pergunna*, it was necessary, according to the Hindoo Law, in order to preserve such interest, that they should have applied for a renewal of the *putta*, and thereby have undertaken the discharge of the *jumma*, and other engagements relating to the *pergunna*, which they failed to do.

III.—Because the Appellant did not, by means of the lease to *Ram Nidhee Ghose*, or by any other instrument, preclude himself from alienating, either wholly or partially, his *zemindary* rights, subject to all existing contracts; and because, having such power, the Appellant did subsequently grant a perpetual lease of the *pergunna* to *Suroop Chund Roy*, subject to all such existing contracts, among others, to the interests (if any) of the heirs of *Ram Nidhee Ghose*.

IV.—Because the Appellant did not, and did not assume to, grant to *Suroop Chund Roy* any interest in the *pergunna* which he was not lawfully empowered to grant; and because the Appellant cannot be made responsible for any acts which may have been committed by his alienee, in violation of the legal rights of proprietors having partial interests, such acts not having been sanctioned or concurred in by the Appellant.

V.—Because *Suroop Chund Roy* (if any one), and not the *Maha-raja*, was liable to the Respondents.

VI.—Because the Appellant and the heirs of *Suroop Chund Roy* being co-Defendants, the Appellant had no opportunity of contesting with the heirs of *Suroop Chund* the liability of the Appellant to indemnify *Suroop Chund* against the consequence of the Respondents' proceedings.

The Respondents, *Sri Kanth Ghose* and *Muhendra*

Narain Ghose, in support of the Decree, relied upon the following reasons:—

I.—Because the act of dispossessing the heirs of the deceased *ijara-dar*, before the expiration of the term of the lease granted to the late *Ram Nidhee Ghose* by the *Maha-raja*, was of itself arbitrary and unjust, and contrary to law.

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II.—Because the heirs of *Ram Nidhee Ghose* were entitled by hereditary succession, to continue in possession of the *pergunna* and *mahals* in question, for the remaining term of the lease, there being no *malguzary* arrears due, or any default made in the payment of the rent or *kists* required by law.

III.—Because the heirs of *Ram Nidhee Ghose* were entitled to full compensation, for the loss of profits, derived from the farmed *mahals*, for the three years during which they were so illegally kept out of possession, and the *Maha-raja*, as the owner of the *mahals*, and the original ejector, rightly declared liable for the amount of such profits, and the interest as claimed by these Respondents.

The other Respondents, the representatives of *Suroop Chund Roy*, also supported the Decree for the following reason:—

Because, under the circumstances, the *Maha-raja* was bound to indemnify *Suroop Chund Roy* and his heirs, against the claim made by *Sri Kanth Ghose*, in respect of the *pergunna* in question, and the demand being established, the *Maha-raja* was the proper party liable to satisfy that demand, according to the tenor of the Decree appealed from.

Mr. *Charles Buller*, Mr. *Jackson*, and Mr. *Forsyth*,
for the Appellant.

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Mr. *Wigram*, Q. C., and Mr. *Edmund F. Moore*,
for the Respondent, *Sri Kanth Ghose* ; and

Mr. *Burge*, Q.C., and Mr. *E. J. Lloyd*, for the
Respondents, the representatives of *Suroop
Chund Roy*.

The Right Hon. Dr. LUSHINGTON :

13th May

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This is an Appeal from the *Sudder Dewanny Adaw-
lut* at *Bengal*, and the subject of the suit is a lease of
the *pergunna Monohur-Shahi*. It does not appear that
any lease was executed in writing, but the Appellant,
the *Zemindar*, states the agreement in the following
terms, addressing it to the native servants, that “ The
mahal in question has been given in farm to *Ram
Nidhee Ghose*, from 1210 to 1216, B.S., a period of
seven years: he will receive petitions and *kabooliats*,
and take possession, and transact business according
to rule. You will attend upon him, and cultivate the
soil, pay rent, render papers, and not act contrarily in
any way.”

This is done in a notification bearing date the 13th
of *April* 1803, addressed to all the native officers of
the *pergunna*. Such an acknowledgment, coming
from the Appellant, is, as against him, conclusive evi-
dence of the terms of the agreement.

The original lessee continued in possession for four
years and two months, and died on the 11th of *June*
1807.

There is no dispute as to these facts, and the only
question arising is one of law, whether, by the terms
of the grant and the Hindoo Law, the lease terminated
with the death of the original grantee, or survived

during the remainder of the term, to his heirs and representatives.

With respect to the construction of the grant, it is contended on behalf of the Appellant, that it contains no words which would necessarily import a continuance of the interest after the death of the grantee, and this may possibly be true. But on the other hand, the lease is for the fixed term of seven years, and there are no expressions which point to any earlier determination of the interest. The *prima facie* meaning then is a continuance for seven years, and had there been any intention on the part of the grantor to have affixed any limitation, he ought to have done so by the insertion of qualifying words. Had such been the intention of the parties, nothing could have been easier than to have added, "Provided the grantee so long live." And if the party having the full power to engraft the qualification, omits to do so, the general principles of law would be opposed to any implied presumption.

These are the general principles of construction, which their Lordships would be inclined to apply to the grant, but as this is a transaction to be governed by the Hindoo Law, a contrary interpretation may prevail, if it be shown that the *prima facie* construction is contrary to the Hindoo Law, or the established custom of construing such contracts in *Bengal*.

The *onus* of proving the law must necessarily lie upon the Appellant, who seeks to show that the contract should be governed, not by general, but by particular rules.

The question then is narrowed to this point:—Has the Appellant proved the law governing Hindoo transactions, to be such as he avers it is, by authority from any books of Hindoo Law, or by decided cases, or has

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As to the first head of proof, it may be very quickly disposed of ; neither here nor in the Courts below, has any authority been cited, from the text books of Hindoo Law, opposed to the decision of the *Sudder Dewanny Adwalut*.

Secondly. With regard to decisions in the Courts below, one case was cited, *Zoolfikar Ali v. Akbar Hossein*. This case occurred in the Provincial Court of *Moorshe-dabad* in 1811, and was decided by Mr. *Roche*. It does not, however, appear to have been considered as any authority upon the question of law by any one of the six Judges, under whose cognizance this case from time to time has come. It is not adverted to by any one of them, and when the case itself is examined, it is doubtful whether it has any bearing on the main question. It is not clear that the grant in that case was for a term of years, and the suit was by the person who had become the security, and who did not appear to be the heir of the farmer or original lessee. There is no decided case adverse to the claim of the Respondent.

Then, with respect to the third ground, viz., the averment that the continuance of a lease granted for a term of years, for the remainder of that term, to the heirs of the deceased tenant, is at variance with the established customs under which such property in that country is held, and might be very detrimental to the system. This argument wholly fails. It is not averred nor proved, that the subsistence of the lease for its full term, although the original lessee should die during

the currency, is an unusual occurrence in *Bengal*. Nor is it said that the maintenance of such lease would be productive of injury to the community. Not one of the Judges have supported such an opinion, and if there had been any sound ground for such an opinion, their local experience could not have failed to suggest it. Mr. *Courtney Smith*, who was of opinion that the Respondents were not entitled to recover at all, founds his judgment, not on the general law, nor upon the supposition that mischief must always arise from the upholding a lease after the death of the lessee, for the remainder of the term, but upon circumstances which he conceives may belong to this transaction, as the want of a specific condition for the continuance of the term, after the death of the lessee, the youth of the heir, and the poverty or supposed insufficiency of the security. I may observe that none of these latter grounds were attempted to be insisted upon at the Bar.

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It is not necessary to prosecute this inquiry further : their Lordships are well satisfied that the Judgment of the *Sudder Dewanny Adawlut*, maintaining this lease according to the *prima facie* meaning of the contract, is not contrary to the law or practice of *Bengal*, and so far from being detrimental to the just rights of property, or due cultivation of the soil, a holding which enables the lessee to expend his capital in the improvement of his farm, without the prospect of the due reward being lost to his heirs, in case of his own death before the expiration of the term, cannot be otherwise than beneficial.

The Respondents are the heirs of such a tenant, and as they have been deprived of the beneficial enjoyment of the farm for nearly three years, their Lord-

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ships concur with the Court below, in thinking that they are entitled to be indemnified, for the loss accruing from the wrong done to them.

But a question remains, as to who is liable to make good this loss. The Appellant, the *Zemindar* of *Burdwan*, the original proprietor and lessor, or the representatives of *Suroop Chund Roy*, who form another set of Respondents in this case ; *Chund Roy* having, on the death of the grantee of this lease, taken a *putny talook* of the whole estate of which this farm formed a part.

In the Provincial Court, and in the *Sudder Adawlut*, there has been much litigation on this point, and much evidence taken ; but it does not seem to their Lordships necessary to set forth the details of those proceedings. By the final judgment of the *Sudder Adawlut*, the *Zemindar* of *Burdwan*, the Appellant, has been decreed to pay the damage which has accrued. He is the original and moving cause of all the loss which has befallen the Respondents. Without due regard to the contract he had entered into, and whilst that contract was still subsisting, he demises to *Chund Roy* the whole estate, including this farm, for an increased rental. The *Maha-raja* indeed contends that in the *kabooliat* to *Suroop Chund* he had stipulated for the observance of existing leases, but Mr. *Harington* disposes of this argument by showing that this stipulation could not reasonably be extended to cover this grant ; for, if the old lease were to continue, there would be no source from which the new lessee could fulfil his engagement ; as to a prohibiting clause, with regard to this lease it is utterly at variance with the main case of the *Maha-raja*, namely, that the lease had expired by the death of the lessee.

The *Maha-raja* has, therefore, by his own acts, and through the medium of others whom he has empowered to act, violated his own engagements, and thereby occasioned great loss to the Respondents. For this loss their Lordships are of opinion that the *Sudder Adawlut* have justly made him responsible. The amount of the damages given appears to have been fairly fixed, according to the increased rent, which the new lessee undertook to pay ; the Court below gave for the three years the Respondents were dispossessed, 42,000 rupees, being the amount the new tenant undertook to pay—certainly not an exorbitant estimate of the real loss. Their Lordships are, therefore, of opinion that the Decree of the *Sudder Dewanny Adawlut* must be affirmed, and with costs.

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AND

RANY ANGA MOOTTOO NATCHIAR - - - *Respondent.**

On Appeal from the Sudder Dewanny Court at Madras.

*Practice—Pleading and proof—Decision based on point not averred in the
 plaint—Effect—Suit by Hindoo widow for possession of husband's
 estate—No allegation of division in the plaint—Evidence to show fact
 of division and finding as to division in fact—Decision turning on such
 finding—Effect—Procedure.*

In a suit for possession of a *zemindary*, the Plaintiff's title depended upon the fact of a division having taken place between the family. No averment of such division was made in the plaint, nor did the Courts in India, as required by the *Madras Regulation XV. of 1816, sec. 10*, make it a point to be established, though some evidence was given of the fact. Held on appeal, that there had been a miscarriage, the conditions of the Regulation being imperative, and the Decree of the *Sudder Dewanny Adawlut* reversed.

But, as the parties had acted under a misapprehension of the Regulation, leave was given to institute a fresh suit within three years.

THE suit out of which the present Appeal arose, was originally instituted in the Provincial Court for the Southern Division of *Madras*, by the Respondent, *Rany Anga Moottoo Natchiar*, the fifth wife and eldest surviving widow of the late *Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver*, *Zemindar* of *Shivagunga*, deceased, against *Moottoo Vijaya Raghanadha Bodha Gooroo Swamy Perria Woodia Taver* (since also deceased, and now represented by the Appellant), the son of *Moottoo Vadooganadha Taver*, and the great nephew of the deceased *Zemindar*, *Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver*, for the recovery of the *zemindary* of *Shivagunga*.

13th, 14th,
 & 18th June
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* Present: Members of the *Judicial Committee*,—The Lord President, the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

claimed by her as the sole and legal heiress (being the senior surviving widow of *Gowery Vallabha Woodia Taver*), in default of male issue of the late *Zemindar*, according to the customs of his caste, and the Hindoo law of inheritance.

The plaint represented her claim to be, that *Moottoo Vadooganadha*, the *Zemindar*, was upon his death succeeded by his widow, and that his widow adopted the late *Zemindar*, *Gowery Vallabha Woodia Taver*; that *Gowery Vallabha Woodia Taver* was placed in possession of the *zemindary* at the death of his adopted mother; that he was ousted of that possession by *Murdoo Sarvacar*, and re-instated by the Government, and then invested with a permanent *potta*; that an alleged Will of *Gowery Vallabha Woodia Taver*, which was set up by the Defendant, and under which he had procured himself to be put in possession of the *zemindary* by the Collector, was a forgery; and that she, the Respondent, had, in an *arzi* addressed to the Collector on the third day after her husband's death, protested against the validity of the Will, and had insisted upon her own title to the *zemindary*; that in answer to certain *takeeds*, forwarded to her by the Collector, demanding to know whether she was willing to admit the Will, she directed her son-in-law to write to the Collector, and repeat the allegation that the Will was fabricated, and that she was herself the legal heiress; and that she was informed by her son-in-law that he had accordingly addressed the Collector to that effect, and that upon the possession being committed to *Moottoo Vadooga Taver*, she had sent her father to the Collector for the purpose of making the same representation.

The answer of *Bodha Gooroo Swamy Woodia Taver*,

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denied that the title of *Gowery Vallabha* was derived by adoption; and stated that *Woya Taver* and *Gowery Vallabha Woodia Taver* were co-heirs of the *zemindary*, which was indivisible, and he insisted upon his own right, in effect, on the ground—first, that the original right was in *Woya Taver*, and was not prejudiced by the *potta* issued to *Gowery Vallabha Woodia Taver*; secondly, that he was the eldest male heir of the deceased *Zemindar*; thirdly, that the effect of the Will, in the contingency which had happened, was to vest the title in him; and, fourthly, that the acquiescence and acknowledgment of the Respondent, as shown by her *arsi* to the Collector, and her acceptance of a provision from *Moottoo Vadooga Taver* out of the *zemindary*, had precluded her from disputing the dispositions which the Will had made.

The reply of the Respondent denied the authority of the Will, and of the other documents which had been adverted to in the answer of the Defendant; and the Respondent insisted that the *zemindary* was not hereditary, but was separately acquired by *Gowery Vallabha Woodia Taver*, and that as such separate acquisition it belonged to his widow, in preference to the male descendants of his brother.

In the above proceedings, no issue was raised as to a division of the common property of the brothers, having taken place.

On the 5th of *December* 1834, the Provincial Court pronounced a Decree, dismissing the Respondent's plaint with costs. Against this Decree the Respondent appealed to the *Sudder Dewanny Adawlut*, insisting on the same case as before, but without raising any issue as to a division of property between the brothers.

On the 17th of April 1837, the *Sudder Adawlut* proceeded to pronounce the following Decree:—

“In proceeding to determine upon this claim to succeed to the *zemindary* of *Shivagunga*, as between the Appellant (the present Respondent), *Anga Moottoo Natchiar*, the surviving widow of the late *Zemindar*, *Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver*, and the Respondent (the now Appellant), *Bodha Gooroo Swamy Taver*, who has succeeded, in the possession of that *zemindary*, his father, who was the son of the elder brother of the said deceased *Zemindar*, the Court deem it proper to notice decisions of this Court, of which the effect appears to them to be that the grantee of the *sunud-i-milkeat-i-istim-rar** must be held to hold the *zemindary*, under that grant, as self-acquired property. There is indeed in the present case especial ground, as observed in the question put by the Provincial Court to the *pundits*, for so regarding the tenure of the above-named *Zemindar*, and that ground is mentioned in the Proclamation of this Government, bearing date the 6th July 1801, which is an exhibit on record.

“It is plainly deduceable from Regulation XXV. of 1802, that previously to the fixing of the permanent assessment, succession to *zemindary* tenures was not governed exclusively by the laws of inheritance, but that the ruling power created, tolerated, abolished, or disposed of these tenures, as might be considered most expedient for the purpose of realizing the public revenue from the lands. It is clear, therefore, that in rejecting the claims of the original Plaintiff, whatever might be the specific grounds of such rejection, and in granting the *zemindary* to the original Defendant, the

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* Deed of permanent Lordship.

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British Government exercised a right which, according of the declared usages of the country, was vested in the ruling power.

“Other decisions on claims to *zemindaries* have gone to affirm the decision that the grant of the *sunud-i-milkeat-i-istimrar* was in each instance an act of the mere will and pleasure of the Government, irrespective of the rules of hereditary succession, and the Court contemplating therefore the property conferred by that *sunud* as the self-acquired property of the original grantee, put the following questions to the *pundits* of the Court with reference to the claim under consideration. Question:—

“1. A. and B. were brothers, of whom the younger, B., acquired, without the aid of any paternal property, a distinct and separate estate, in which A. was not entitled to, and did not participate. A. died, leaving a son, and afterwards B. died, leaving a widow and daughters, but no son, son's son, or son's grandson. Upon B.'s death, under the foregoing circumstances, is his widow entitled to succeed to his said estate, or is the son of A. entitled to succeed thereto, in preference to B.'s widow?

“(The authorities for the answer to the above question to be stated at large.)

“Answer. If A. and B., the brothers, had not divided their common property, acquired by their father, or paternal grandfather, or others, the son of A., the elder brother of B., is entitled upon B.'s death to succeed to the estate mentioned in the question, which was acquired by B. himself.

“2. If A. and B., the brothers, had divided their common property acquired by their father, or paternal grandfather, or others, the widow of B. is entitled to

succeed to his self-acquired estate mentioned in the question.

“Authorities are,—The text of *Vrihaspati*, and the commentary thereof, on the subject of the right of succession to the estate of one who leaves no male issue, in the law-books called *Smriti Chandrika Madhaviyam*, &c., *Dharma Sastras*. It must be understood that the widow has this right in case of her husband being separated from his co-heirs. Accordingly, *Vrihaspati* declares the several kinds of property received in mortgage, &c. the (*jaya*) wife shall take, with the exception of real property, in cases of divided family. The meaning of this text is explained by the author of *Smriti Chandrika* as follows: (The widow) shall in cases of divided family take the whole estate, real and personal, received in mortgage, &c., belonging to her husband. By the term ‘divided family’, it follows, that in the case of undivided family, the wealth of a person who died leaving no male offspring, shall devolve solely upon his father, brothers, &c., who lived together.—The term (*jaya*) means the wedded wife; the passage, ‘with the exception of real property,’ regards the widow who has no daughter.

“2. The text of *Nareda* and its commentary on the subject of the right of succession to the estate of one who leaves no male issue in the law-books called *Vyahavahara*, *Mayukha*, &c., *Dharma Sastras*, *Nareda* says, ‘Among the brothers, if any one die without issue, or enters a religious order, let the rest of the brethren divide his wealth, except the wife’s separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. If they behave otherwise, the brethren may resume that allowance.’ ‘This,’ *Madana* sa

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'relates to the widow of an undivided or re-united brother, since it is read under that head.'

"3. The commentary on the text of *Yagnyawalkya*, declaratory of the right of widow, daughter, &c., to inherit the estate of one who leaves no male issue, inserted in clause 39, section 1, chapter 11, of the law-book called *Mitachara*, 'Therefore it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue.'

"The answer of the *pundits* makes the decision between the parties to this appeal dependant on the fact of there having been or not been a division of paternal property between the late *Zemindar* and his elder brother.

"The Provincial Court have assumed the negative of this question, but on what grounds does not appear, for the Decrees of that Court take no notice of the evidence produced by the parties in the original suit on this point.

"The Court are of opinion, that the direct evidence to the fact of a partition of patrimonial property between the said two brothers, in the year 1792, including the '*cavel*' land at '*Padamattoor*,' which is given by witnesses for the Plaintiff in the original suit, is entitled to much consideration.

"It is incidentally mentioned in the course of that evidence, that the late usurper of the estate deprived the younger brother of the share which fell to him upon that partition, a circumstance accordant with what is stated in Mr. *G. A. Hughes's* evidence as to the treatment which he had received from the "*Murdoo* family.'

“The whole tenor of Mr. *G. A. Hughes*’s evidence tends to strengthen the presumption of the separation of the brothers. The facts of the allotment by the younger brother to the elder, of the *talook* of *Padamattoor*, of the latter’s doing homage with other head inhabitants on the occasion of his younger brother’s investiture as *Zemindar* in 1801, of the fostering care extended by the late *Rany* to the younger brother, which induced a general impression of his claim to be her successor, and would seem to have given rise to a belief of his adoption by her, all tend to corroborate the direct evidence to the state of separation between the brothers, previously to the grant of the *zemindary* by the Government, to the husband of this Appellant.

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“Of the state of division as between the said *Zemindar* and the descendants of his said elder brother, there is strong evidence, deducible from their having lived separately, having manifestly no community of interest whatever; and also from the circumstances out of which the suit in the Provincial Court arose, and the terms of the *razinama* in which that suit resulted.

“It is also worthy of observation, that while the direct evidence to the fact of partition is thus corroborated by facts, proved by other and independent evidence, the testimony of the witnesses for the Defendant in this suit, who deny the fact of such division, and assert in contradiction of the witnesses on the opposite side, that the two brothers lived and performed their religious ceremonies together, is shaken, and their pretensions to credit are, indeed, destroyed, by their having deposed to notorious falsehoods, such as that the elder brother, on whom the *zemindary* had

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been conferred by the Government, gave it to the younger; that the two brothers managed the *zemindary* jointly, and that the younger held it as the elder's agent ('*Kariastan*').

"Upon the whole it appears to the *Sudder Adawlut*, that the fact of the division is proved, and that consequently, according to the foregoing exposition of the Hindoo Law by the *pundits*, the widow of the late *Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver, Anga Moottoo Natchiar*, is entitled to succeed to the *zemindary*, as the rightful heir of her said husband, in preference to the descendants of his elder brother.

"It remains for the Court to decide upon the effect of the Will alleged to have been executed by the said late *Zemindar* in favour of the father of the Respondent in this Appeal, and of the deed of agreement dated the 29th of *July* 1830, purporting to be executed by the Appellant, in conjunction with two other widows of her deceased husband.

"As to the Will, there is in corroboration of the evidence to its fraudulent fabrication, the obvious circumstance of the extreme improbability that the *Zemindar*, had he intended to make such a disposition, would have put it off until his last moments. The Court of *Sudder Adawlut*, moreover, believe the evidence, which shows that at the time of the alleged execution of this Will, the said *Zemindar* was in such a condition as to deprive it of all legal validity.

"In the deed of agreement above mentioned, it is declared that the obligee and 'his posterity shall enjoy the *zemindary* by the right which he possesses, and by virtue of the Will left in his favour by the late *Zemindar*', and the three widows agree to receive certain villages

described as granted by the other party for their maintenance.

“The Appellant denies having been a party to the said agreement, which she avers to be a forgery ; but it appears to the *Sudder* Court that it is unnecessary to pass any determination on that point, because in their opinion, even if she did execute that deed, it is in no way binding upon her, whose legal right to succeed as the heir of her late husband was preferable to that of the party to whom it was executed, and in whom the terms of the deed presuppose that a valid title vested at the time of its execution.

“Error, as well as ignorance of right, renders a contract or agreement invalid, by invalidating the assent given to it, and the *Sudder* Court entirely concur in the following observations by Sir *Thomas Strange*, in his ‘Notes of Cases at *Madras*,’ viz.,—A native woman is ‘under the special protection of the Court, entitled to the benefit of that principle, which in equity, subjects to be regarded with peculiar jealousy all transactions with persons, whom the policy of the law considers to be, at the time, incompetent to maintain their own right, and to exact for themselves justice. A native woman can never be deemed sufficiently *sui juris*, to be held bound by her personal acts, if there exists the slightest reason to apprehend, that advantage may have been taken of her.’ (Vol. II. p. 16.) Again ; ‘A Court administering Hindoo Law must, to do justice, often interpose between a native woman and her acts, as Courts of Equity do at home, in all cases, between persons standing together in certain specified relations, giving to the one a presumed advantage over the other.’ (Vol. II. p. 159.)

“In the present case, supposing that the Appellant

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did execute the deed of agreement, it appears to the Court that there is the strongest reason to apprehend that advantage was taken of her.

“ The opposite party had obtained and held for more than a year, possession of the *zemindary*. The Appellant’s ignorance of her own right is presumable from her not then impugning his, and acquiescing in his usurpation ; by this deed, moreover, she is made to accept a grant of villages belonging to the estate to which she is herself entitled, and on this consideration admits the usurper’s title.

“ For the foregoing reasons, the *Sudder* Court resolve to reverse the Decree of the Provincial Court in the original suit, and do adjudge the said Appellant, *Anga Moottoo Natchiar*, to be the rightful *Zemindar* of *Shivagunga* ; and, on the principle of the rule laid down in the circular order of the 22nd of *October* 1829, the Court do award to the said Appellant, in addition to the said *zemindary*, the amount of the profits thereof, from the date of the institution of the original suit to this date, which amount the Provincial Court of Appeal will ascertain by the best procurable evidence.

“ And the *Sudder* Court do further adjudge that the Respondent in the Appeal (the present Appellant) shall pay all costs of suit in this Court and in the Provincial Court.”

On the 25th of *September* 1837 a motion was made before the *Sudder* Court by the Appellant for a review of judgment, whereby he alleged that he had lately discovered further documentary evidence, consisting of the records of the *Zilla* Court of *Madura* in former suits by the late *Zemindar*, which would prove that the late *Zemindar* and his grandfather were undivided brothers.

This application for a review of judgment was met by a counter-petition of the Respondent. She also presented a further petition, stating that the documents forming part of the Record of the *Zilla* Court of *Madura*, referred to by the Appellant in his petition for a review of judgment, as establishing that the late *Zemin-dar* and his grandfather were an undivided Hindoo family, had been falsified, and that important erasures and interpolations, changing the whole context and meaning of the pleadings, had been made.

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The *Sudder* Court, on these representations, ordered the documents, forming part of the record above alluded to, to be transmitted to them, and directed the attention of the Acting *Zilla* Judge to those parts of the documents which declared that the brothers were undivided, and required him to state whether there were any grounds for the assertion that there had been fraudulent alterations.

Evidence having been taken, and a report made in pursuance of the above Order to the *Sudder* Court, respecting the documents in question, that Court, after a minute examination of the circumstances, pronounced the documents to have been falsified, and expressed itself of opinion that "more palpable or more infamous forgeries than those exhibited in the originals never were detected, and never came before a Court of Justice ; and as the falsities they contain could benefit no other person in existence than the Respondent, and as he, well knowing their falsehood, availed himself of them by filing authenticated copies to deceive this Court, it appears to the Court morally certain that the forgeries in the originals were perpetrated with his knowledge and by his agents.

"The Court had not the slightest hesitation in reject-

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ing the Respondent's application for a review of judgment, and it was thereby rejected accordingly ; and they further directed that an extract from the proceedings be annexed to the record of the suit, and submitted to Her Majesty in Council, with the appeal which the Respondent had preferred from this Court's Decree against him."

The Appellant afterwards applied for and obtained leave to appeal from so much of the above decree of the *Sudder* Court of the 17th of *April* 1837 as related to the suit originally brought by the present Respondent, to Her Majesty in Council.

Pending this Appeal, and on the 10th day of *January* 1841, the original Appellant died, leaving *Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver* and *Namaseva Taver*, his undivided brothers, and a widow, *Magamoo Natchiar*, him surviving.

On the 1st of *February* 1841, *Srimut Mootloo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver*, the present Appellant, presented a petition to the *Sudder Dewanny Adawlut*, reporting the death of his brother, and praying to be admitted to prosecute the Appeal, which, after an inquiry directed by the Court, he was ultimately allowed to do.

These further proceedings having been transmitted to *England*, the Appeal was ordered by Her Majesty in Council to be revived against the Respondent.

The Appeal now came on for hearing.

Mr. *Kindersley*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant ; and

Mr. *Burge*, Q. C., Mr. *E. J. Lloyd*, and Mr.
Edmund F. Moore, for the Respondent.

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It was argued by the Appellant, that *Woya Taver* and *Gowery Vallabha Woodia Taver* were undivided brothers, and, therefore, *Gowery Vallabha Woodia Taver* having died without male issue, the Appellant, as the eldest male descendant of *Woya Taver*, was entitled to the *zemindary*. That the *Sudder Adawlut*, in holding that *Woya Taver* and *Gowery Vallabha Woodia Taver* were divided brothers, decided not only against the fact, but upon a question not raised on the pleadings in the cause, and contrary, therefore, to the express provisions of the *Madras Reg. XV. of 1816*, sec. 10, cl. 3.

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The Right Hon. Dr. LUSHINGTON:

The present litigation is between the widow of the party who was last seised of the *zemindary*, and his great nephew, and various suits appear to have been instituted with regard to the rights to this property and the claim of the parties put on various grounds, but their Lordships are of opinion that the whole question is now narrowed to a very short point.

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In the Provincial Court, certainly, some notice was taken of the question whether any division had actually been proved to have taken place between the two brothers or not, and the Provincial Court were of opinion that there was not satisfactory evidence to establish the fact of the division. But when the Appeal came to be brought before the *Sudder Adawlut*, that Court came to a contrary conclusion, and decided this case in favour of the widow, on the express ground that the two brothers had become divided, and that, in

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consequence, this property, whether self-acquired property or not, according to their opinion and judgment, would belong to the widow, and not be inherited by either of the brothers or the nephew or the great nephew.

With regard to the question of law, as far as the opinion of the *pundits* could determine it, there seems to have been no difference ; they have all stated in substance to this effect ; that the right and title to the *zemindary* depended on the fact of division, and the fact of division therefore was, and is, a most substantial question to be determined in this case. Now their Lordships find, upon an examination of all these proceedings, that the fact of the division has never been alleged in any of the pleadings. They find that, according to Regulation XV. of 1816, the division ought to have been made a distinct point in the cause, and that an order ought to have been given for the production of evidence in proof of such an averment.

Then it comes to this, that there has been no such averment, no such point made, and no such direction given, and how it was that the evidence came to be taken on the one side, or on the other, with respect to the question of division, no satisfactory explanation has been afforded at the Bar.

Now their Lordships entertain a very strong conviction of the absolute necessity of adhering to this Regulation ; for it is, in the first place, a Regulation emanating from the highest authority, and is entitled to the force of law ; and is, in the second place, one, in their Lordships' judgment, of the utmost importance for preserving the regularity of the proceedings of the Court in that country, and for preventing constant confusion and uncertainty as to what really are or are

not the points in litigation, and to which the evidence is to be directed. They conceive that this Regulation has been most wisely framed ; first, in affirmatively directing that the points on which evidence is to be taken shall be distinctly set forth, and that it shall be a duty imposed on the Court, if those points do not appear to be sufficient for the final termination of the litigation, that they should state distinctly, as a matter of record, the further points on which evidence is to be taken. Further, the Regulation, after having thus affirmatively stated what is to be done, goes on to state what shall not be done. “ In like manner, if proof shall be required on any other points in the course of the trial, such points shall be recorded on the proceedings, and the proper party shall be called upon for the requisite evidence, and no exhibit shall be filed, or witnesses summoned, unless expressly declared to be in proof or refutation of some point upon which the Court may have directed that evidence should be taken.”

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Now this Regulation, important as it is, and most clearly expressed, points directly against the course which has been unfortunately adopted in this case ; because the point on which the whole case turns, and in the opinion of the *Sudder Dewanny Adawlut*, beyond all question, the whole case was decided, never was alleged as a point, in any of the proceedings, and the evidence which was read in support of it never was directed or sanctioned by the Court.

It is in the opinion of their Lordships, therefore, indispensably necessary, for the purpose of supporting and securing the compliance with this most wholesome Regulation, that they should act in conformity with this Regulation ; the inevitable consequence is, that

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they cannot sustain the decision of the *Sudder Adawlut*, because it is upon the ground of that point, as the point of division alone, on which that judgment rests.

But, looking at the whole of these proceedings, they do not think that it would be consonant with justice at once to reverse the Decree of the Court below, and to affirm the Decree of the Provincial Court: they think that the parties have unfortunately lost their way, and on that mistake and misapprehension it would be going too far finally to dispose of the case now.

For these reasons their Lordships are of opinion that the Decree of the *Sudder Adawlut* must be reversed, but that leave should be given to the Respondent to bring a new suit, notwithstanding the Decree of the Provincial Court, at any time within a period presently to be specified, and after full communication of Her Majesty's Order in Council shall have been made to the parties interested; and though their Lordships can make no Order on that subject, it would be exceedingly desirable that it should be known to all those who are interested in this property, that the question of facts as to division or no division, appears to be the only point on which the main question of title to this property will ultimately depend. We think three years is a proper time after the Decree is received in *India* and disclosed to the parties.

KHAJAH HIDAYUT OOLAH - - - - Appellant,
 AND
 RAI JAN KHANUM - - - - Respondent.*

On Appeal from the Sudder Dewanny Adawlut at Bengal.

Mahomedan law—Legitimacy—Proof—Presumption from continued co-habitation—If justifies inference of marriage.

By the Mahomedan law, continual co-habitation and acknowledgment of parentage is presumptive evidence of marriage and legitimacy.

THE original parties to this Appeal were the widows and son of *Fyz Ali Khan*, deceased, and the subject in dispute was the right of the Respondent, *Rai Jan Khanum*, as widow, suing for herself and on behalf of her son, *Saadat Ali Khan*, a minor, for Rs. 188,525. 8 *anas*, 9 *gundas*, being a 15-*ana* share, the alleged amount of their succession on a distribution according to the Mahomedan law of inheritance of the real and personal estate of the late *Fyz Ali Khan*.

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The following facts and circumstances gave rise to the Appeal :—

Fyz Ali Khan, deceased, was the *Zemindar* of *kismut pergunna Atya*, and other real and personal property.

In the month of *Phagoon* 1203 (7th March 1797, A.D.), *Fyz Ali Khan* intermarried with the Respondent, *Rai Jan Khanum*, who was then about ten or twelve years of age.

The marriage was celebrated in the presence of wit-

* Present: Members of the *Judicial Committee*,—The Lord President, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

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nesses, and on the same day *Fyz Ali Khan*, as it was alleged, executed a deed of marriage settlement, endowing the Respondent with a dower of 2,000 *gold mohurs* and 21,000 *sicca rupees*, the payment of a third of which was to be postponed as long as the marriage should remain in force.

After the celebration of the marriage, the parties cohabited together as husband and wife, and were so universally acknowledged and reputed by their neighbours and acquaintances.

In the year 1215 (1808-9, A.D.), the Respondent, *Rai Jan Khanum*, gave birth to a daughter, the issue of the marriage, which survived but a short time.

In the year 1813, A.D., *Fyz Ali Khan* was about to be married to the original Appellant, *Shums-oon-Nissa*. The Respondent, *Rai Jan Khanum*, opposed this second union, and she presented a petition to the *Zilla Court* of *Mymensing*, setting forth the conditions contained in her marriage deed of settlement, and praying that her husband might be prevented from granting a deed of marriage settlement without her concurrence. On this occasion no question was raised as to *Rai Jan Khanum* being the wife of *Fyz Ali Khan*, but (apparently on the ground of *Rai Jan Khanum* not being entitled to require the interposition of the Court) the petition was, by an Order of the 11th of *December* 1813, rejected; and on the 16th of *December* 1813 a marriage was celebrated between *Fyz Ali Khan* and *Shums-oon-Nisa*, and a marriage settlement was thereupon executed in her favour by *Fyz Ali Khan*. Both wives continued to live with *Fyz Ali Khan* until about the year 1816, when the Appellant, *Shums-oon-Nissa Khanum*, was reported to have eloped from his house and took up her residence at *Dacca*.

In the year 1816, *Fyz Ali Khan*, in consequence, as was alleged, of the use of opium and other intoxicating things, became incapable of attending to business. Proceedings were, therefore, taken, pursuant to Regulation X. of 1793, by the Court of Wards, for the purpose of ascertaining his capability to take care of himself and his property, under which the Collector of the district was directed to take charge of his estates, and to name a proper person to be the guardian of the person of *Fyz Ali Khan*.

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The Collector accordingly took possession of the estates of *Fyz Ali Khan*, and on the 19th of *July* 1816 reported the fact to the Court of Wards, recommending one *Ram Chunder Chatoorjia* as guardian to take care of his person, with a salary of twenty-five rupees *per mensem*, and an allowance of Rs. 200 *per mensem* for the maintenance of *Fyz Ali Khan* and his two wives and mother. The recommendation of the Collector was approved of by the Court of Wards.

On the 20th of *December* 1817, A.D., the Respondent, *Rai Jan Khanum*, being pregnant, presented a petition to the Court of Wards, informing them of her situation, and praying that orders might be issued for paying the expenses which might be incurred by acts of festivity and charity according to the custom of the family consequent on the birth of a child. An order was accordingly issued to *Ram Chunder Chatoorjia*, the guardian, directing, that if the Respondent had been with *Fyz Ali Khan* for one year more or less, and had become pregnant, she should have a midwife and other requisites.

Previous to this Order reaching the guardian, and in the month of *Poos* 1224 (*December* 1817, and *January* 1818, A.D.), *Rai Jan Khanum* gave birth to a son, the

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Respondent, who was born in *Fyz Ali Khan's* house, at *Nurseerabad*, and named *Saadat Ali Khan*.

Upon the Order reaching the guardian, he returned an answer, dated *December 24th, 1817*, stating the birth of a son, and adding, "it is more than a year since the petitioner has lived in a separate house erected by her opposite to the *basa* of the *Khan*. The genuineness of her pregnancy will be apparent to the *Huzoor* upon investigation."

In the year 1822, *Rai Jan Khanum* petitioned the Court of Wards for an increased allowance for herself and her infant son, whereupon the Appellant, *Shums-oon-Nissa*, presented a counter-petition, alleging for the first time that the Respondent, *Rai Jan Khanum*, had assumed the character, and was not the wife of *Fyz Ali Khan*, and praying that the circumstances of her marriage and the birth of her son might be investigated, and that the allowance made to her might be discontinued.

Various proceedings took place in consequence of this petition in the Collector's Office and the Court of Wards, and, amongst others, various official communications, showing clearly that the Respondent was one of the two wives mentioned in the Report of 19th *July 1816*, and had received an allowance accordingly; and also showing the conviction of successive Collectors, that the Respondent was properly the wife of *Fyz Ali Khan*, and that *Saadat Ali Khan* was his son.

On the 16th of *December 1824*, and pending these proceedings, *Fyz Ali Khan* departed this life, having, previously to his death, in the presence of his servants, made over to his son, whom he had acknowledged, all his real and personal estate, leaving his son and his two wives, *Rai Jan Khanum* and *Shums-oon-Nissa Khanum*, him surviving.

Immediately after the death of *Fyz Ali Khan*, the Respondent, *Rai Jan Khanum*, instituted proceedings before the Collector of *Mymensing*, for the purpose of having her infant son's *Saadat Ali Khan*'s name entered in the Registry as proprietor of his deceased father's *zemindary* and othr real estate. In support of her application she filed the depositions of four witnesses, proving her marriage with *Fyz Ali Khan* and the birth of *Saadat Ali Khan*, and the recognition of him by *Fyz Ali Khan*; she also, in consequence of a *per-wanna* of the Collector requiring her to afford proof that *Saadat Ali Khan* was the son of her late husband, filed the depositions of five other witnesses (four of whom were witnesses to the marriage), whose evidence was conclusive as to the fact of the cohabitation of the deceased, *Fyz Ali Khan*, and the Respondent, as husband and wife at *Nurseerabad*, where the deceased then resided for more than a year previous to the birth of *Saadat Ali Khan*.

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The Collector, on the 14th of *January* 1825, recorded his opinion in terms as follows:—"The parentage of *Saadat Ali Khan* as attaching to *Fyz Ali Khan* is proved, and as the age of *Saadat Ali Khan* up to the time of his present writing is seven years, it therefore appears to be proper and expedient to register the name of *Saadat Ali Khan* for the share of the *zemindary*, &c., the estate left by the said deceased, and in consequence of the minority of *Saadat Ali* to retain the *zemindary*, &c., under the control of the Wards, and to appoint a respectable person as guardian, and to fix the monthly allowance of *Saadat Ali* above-named."

Shums-oon-Nissa then instituted a suit in the *Zilla* Court of *Mymensing* against the Respondent, in which a summary decree was pronounced, de-

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declaring that she should be declared entitled to and be put in possession of the whole of the estate of the deceased upon giving sufficient security, and that the Respondent might institute proceedings to establish her claims.

By direction of the Court of Wards, *Shums-oon-Nissa's* name was registered as proprietress of the *zemindary* and other the real estates of the deceased, *Fyz Ali Khan*.

In consequence of *Shums-oon-Nissa Khanum* having thus acquired possession of the whole estate, the Respondent, on the 4th of *September* 1829, filed a plaint in the Provincial Court of *Juhangee-nagur*, or as it is more commonly called the Provincial Court of *Dacca*, on behalf of herself, and as mother and guardian of *Saadat Ali Khan*, against *Shums-oon-Nissa*, in which, after setting forth her marriage with the deceased, *Fyz Ali Khan*, the birth of *Saadat Ali Khan*, the issue of such marriage, and the circumstances already mentioned, and that her husband, the deceased, *Fyz Ali Khan*, had died, seised or possessed of *zemindary* property and other real estate therein particularly enumerated, and also that the sum of Rs. 147,000 was then standing to the credit of the estate of the deceased in the account with the Collector of *Mymensing*, being the surplus profits of the *zemindary* and *talooks*, and stating, that by the Mahomedan Law, on the whole estate being divided into sixteen shares, one share belonged to her, the Plaintiff, and another share to *Shums-oon-Nissa*, as the widows, and the remaining fourteen shares to *Saadat Ali Khan*, as the son of the deceased,—she prayed that she might, in respect to her share and the shares of her son, the said *Saadat Ali Khan*, be put in possession of the fifteen sixteenth parts

or shares of the *zemindary* property and real and personal estate of the said *Fyz Ali Khan*, deceased, such fifteen sixteenth parts or shares being estimated at the value of Rs. 188,525. 8a. 9½p.

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The Defendant appeared and filed her answer on the 13th of *April* 1830, in which she denied that the Respondent was the wife, or that *Saadat Ali Khan* was the son, of the deceased, *Fyz Ali Khan*.

Both parties went into evidence: the Plaintiff filed her deed of marriage settlement with the deceased, *Fyz Ali Khan*, and her petition against the deceased marrying the present Appellant; the correspondence between the collectors of *Mymensing* and the Court of Wards, together also with the depositions already adverted to, of the witnesses of the marriage, and the birth of *Saadat Ali Khan*, taken by the Collector previously to his directing the estate to be registered in the name of *Saadat Ali Khan*. She also called and examined eight witnesses, to prove the marriage and interview of *Fyz Ali Khan* with the Respondent, and recognition by *Fyz Ali Khan* of *Saadat Ali Khan* as his son. Two of these witnesses were subscribing witnesses to the Respondent's deed of marriage settlement with the deceased, *Fyz Ali Khan*; and four others were also present at, and witnesses to, the marriage.

The Defendant also examined various witnesses, with the object of proving that in 1796 the Respondent married a slave of the name of *Mona*, who lived till 1808 or 1809; and that previously to the time of the birth of *Saadat Ali Khan*, she had illicit intercourse with an Englishman.

After an examination of the above evidence, and previous to the Provincial Court pronouncing its Decree, Mr. *Charles Smith*, the Judge before whom the

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cause was heard, entertaining an opinion that the evidence adduced by the Plaintiff, the now Respondent, was not sufficient to establish her marriage with the deceased, *Fyz Ali Khan*, although he considered that there was sufficient evidence to prove that she lived and cohabited with him, and that *Saadat Ali Khan* was her son by *Fyz Ali Khan*, with a view of ascertaining the Mahomedan Law applicable to the case, on the 20th of *September* 1831 directed the following interrogatory to be submitted for the consideration and answer of the Mahomedan law-officer attached to the Court:—

“A person of the Mahomedan faith died, leaving a wife with a marriage settlement, and a female unmarried, and a son of his loins, born of the venter of the said unmarried female; in such case, according to law, do the unmarried female and the son of her venter receive any portion of the property of the deceased, or not? and if they be entitled to receive a portion thereof, then what portion of the property left by the said deceased appertains to each of those three persons respectively, according to the Mahomedan Law? Write a reply thereto on a consideration of the circumstances stated in the proceeding transmitted within the period of three days according to the Word of God, citing therein the name of the book, and the precept thereof. End.”

No answer was returned by the Mahomedan law-officer to the interrogatory thus put to him by the Court, but he, on the 23rd of *September* 1831, presented a petition to the Court, requesting further information. The petition was in terms as follows:—“As the *Moofiti* should necessarily have a comprehension of what is in the mind of the interrogator, to the end that he may

not be chidden both of God hereafter and of mankind, I beg to inquire what is meant by the words 'an unmarried woman,' fornication, or an acceptation given to them by the public. If the signification be that which is generally applied to the terms, the explanation should be given, for the general acceptation given by the public to the term is not determined; various words such as those are applied to particular kinds of legal and illegal marriages. If the meaning be fornication, it is necessary to ascertain the circumstances of the evidence of the witnesses, and the grounds are indispensable, for, according to law, the discovery of fornication is difficult, particularly in reference to a person deceased, which is considered to be impossible, in so much that until the strong grounds, which are prescribed according to the arguments used by the learned, the followers of '*Hanifa*,' are obtained, the word 'fornication' should not be uttered by the tongue. As in the interrogatory there is not a jot of those arguments, and the proceeding is also altogether deficient as respects the details of the evidence of the witnesses, I am unable to write a *futwa*, and entertain the hope that you will require a *futwa* after having satisfied those doubts, or that you will in a general way be pleased to state in an interrogatory or in a proceeding the tenor of the evidence of the witnesses of both parties, and the objections thereto, such as may have found place in the happy mind of your Highness, or otherwise that you will excuse my giving an answer, and issue orders upon my giving in the proceeding and the interrogatory enclosed therein."

In consequence of this petition, Mr. *Charles Smith*, the Provincial Judge, in accordance with Section 4, Regulation II. of 1798, ordered that the interrogatory,

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together with the other proceedings in the cause, should be transmitted to the Registrar of the *Sudder Dewanny Adawlut* of Bengal, and that an answer should be obtained to it from the Mahomedan law-officers of that Court.

On the 10th of *December* 1831, the law-officers of the *Sudder Dewanny* Court returned the following answer:—

“Under the above circumstances, in the event of the proof of these facts, that *Mussumat Rai Jan* associated with *Fyz Ali Khan* and remained with the other females of the house of *Fyz Ali Khan*, and *Saadat Ali Khan* was born of her venter, being the offspring of the loins of the said *Fyz Ali Khan*, as is to be clearly understood from the proceeding of the Appeal Court of *Juhangee-nagur*, dated the 20th of *September* 1831, A.D., which is put up with the proceeding of the said Court, dated the 20th of *September*, *idem*, according to law, the parentage of *Saadat Ali Khan* above named, as attaching to the said *Fyz Ali Khan* above named, is proved, and he and his mother, *Rai Jan*, will both become heirs, and after the liquidation of debts, &c., which are first claimable from the inheritance, the whole property of *Fyz Ali Khan*, deceased, being divided into sixteen shares, one share belonging to *Mussumat Rai Jan* above named and *Mussumat Shums-oon-Nissa Khanum*, the other wife of the said deceased, respectively, and fourteen shares thereof appertain to *Saadat Ali Khan* above named, according to the law of the division of inheritances, and God knows best what is right.”

The Provincial Court not deeming this opinion sufficiently clear or satisfactory, ordered a second interrogatory to be laid before the law-officers of the *Sudder Dewanny Adawlut*, in the following form:—

“A person, a Mahomedan, died, leaving a wife, having a deed of marriage settlement, and an unmarried female, and a son of his own loins, born of the venter of the said unmarried female. In such circumstances, does any portion of the property left by the said deceased appertain to the said unmarried female and the son of her venter? If it do appertain to them, to what portion are they entitled? According to what book, and to what portion is the wife, having a deed of marriage settlement, entitled?”

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In return to this interrogatory, the law-officer attached to the *Sudder* Court, gave the following reply:—

“Under the circumstances stated, if it appear, by the acknowledgment of a Mahomedan, that the child, in respect to whom the interrogatory of the Court is put, is the offspring of his loins, I mean if that Mahomedan have said, ‘This child is my son,’ and afterwards died; and if that woman of whose venter this son is born be a claimant as to this point, ‘I am the wife of that Mahomedan, and this son is mine, and is his offspring,’ in such case this son and this woman will both become the heirs of that Mahomedan, as is clearly stated in the ‘*Hedaya*’ and ‘*Shura-i-Wikaya*,’ in the chapters on the ‘Establishment of Parentage.’ If such be not the facts of the case, and the signification of the words ‘an unmarried woman’ be a woman an adulteress, then, according to the law, the woman an adulteress and the ‘son of adultery’ are neither of them heirs. In the first-mentioned case, I mean in the event of this son and this woman being heirs, the whole of the property of that deceased Mahomedan will, after the liquidation of debts, &c., which have a claim of the first order on the inheritance, be divided into sixteen shares, and fourteen shares thereof will appertain to

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the son, and one share to the mother of that son, and one share to the other wife of that Mahomedan, and God is the best judge of what is right.”

On the 9th of *May* 1832, the Provincial Court pronounced its final Decree, whereby, after setting forth at great length the pleadings in the cause, as well as the *futwas* of the Mahomedan law-officers, it proceeded to decree as follows:—“From all the papers and the bearings of the circumstances of the suit, it appears that *Saadat Ali Khan* was born in the year 1224, B.S., and that *Fyz Ali Khan* died in the year 1231, B.S., and there is not the least doubt remaining, that during the period of seven years, *Saadat Ali Khan*, above named, remained with *Fyz Ali Khan* and received support; and although the witnesses adduced on behalf of the Plaintiff at this Court in the matter of the marriage of the Plaintiff, and the acknowledgment of *Fyz Ali Khan* of the parentage of *Saadat Ali Khan*, have become suspected and are not confided in by the Court, still adverting to the exhibits of the Plaintiff, being copies of papers of the Collector’s office, amongst which are the depositions of sundry witnesses, and to other corroborative facts deducible from the papers of the bundle, confidence may be placed in the fact of *Saadat Ali Khan* being the offspring of *Fyz Ali Khan*, and upon the proof and manifestation of this circumstance, that *Rai Jan* is a female who has associated with *Fyz Ali Khan*, and was maintained with the other females of the family of *Fyz Ali Khan* by means of a monthly allowance, and that *Saadat Ali Khan* was born of her venter from the loins of *Fyz Ali Khan*, a *futwa* was required of the law-officer to ascertain this point: In the case of a female whose marriage and matrimonial contract with a person are not proved, upon the proof

of cohabitation and association with that person, does the son of her venter become the heir and proprietor of the property left by that person, or not? And from the tenor of the *futwas* of the law-officers of the *Sudder*, it is quite manifest that upon proof of association with a female, and the procreation of a son, the son begotten is the person entitled to fourteen shares, and the woman of whose venter that son is born is the heir of one share; hence the claim of *Rai Jan* above named, who associated with *Fyz Ali Khan* for a long time, and was supported with the other females, and in whose venter *Saadat Ali Khan* was begotten of the loins of *Fyz Ali Khan*, and to which effect the claim of *Rai Jan* is advanced, is in every way just, and according to law, such as should be decreed.

“By the words, ‘an unmarried female,’ which were addressed to the law-officers, with reference to *Rai Jan* above named, it was designed as follows:—The marriage and matrimonial contract of *Rai Jan* with *Fyz Ali Khan* have not, in my opinion, been proved; coupled with this fact, *Saadat Ali Khan* having been begotten of the loins of *Fyz Ali Khan* in the venter of *Rai Jan*, are he and *Rai Jan* above named entitled to the property left by him or not? It was not intended thereby to designate ‘an unmarried female, a woman, an adulteress,’ and it is obvious that proofs which are deducible from strong corroborative circumstances are better entitled to confidence than the evidence of witnesses; therefore, in accordance with the *futwa*, *Rai Jan* is the person entitled to one share, and the said minor is the person entitled to fourteen shares of the property left by *Fyz Ali Khan*, and the Defendant is the person entitled to one share thereof after the liquidation of debts, &c., and in this

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suit *Rai Jan*, above named, is the claimant for a fourteen *ana* share of the property left by *Fyz Ali Khan*, on behalf of her own minor son, and for a share of one *ana* on her own behalf, making together a share of fifteen *anas* of the property, real and personal, of *Fyz Ali Khan*: and although the Defendant is a person having a deed of marriage settlement, and according to the *futwas* of the law-officers of the *Sudder*, the liquidation of debts is to be first attended to ; and thereafter whatever remain, the share of fourteen *anas* thereof is the right of *Saadat Ali Khan*, and the share of one *ana* is the right of the Plaintiff, and one other *ana* is the right of the Defendant, still the deed of marriage settlement of the Defendant is not before the Court in this case so as to admit of the issue of a final order for the separation of what is entered therein.”

The Defendant appealed from the above Decree, to the *Sudder Dewanny Adawlut* of Bengal.

Further evidence was entered into on both sides: on the part of the Appellant, the summary Decree under which she obtained possession of the estate, as well as her alleged deed of marriage settlement, were produced; the Respondent filed some correspondence between the Collector and the Board of Revenue.

The *Sudder Dewanny Adawlut* pronounced their final Decree in the cause, on the 31st *December* 1834, which, after stating and commenting minutely on all the facts and circumstances of the case, proceeded as follows:—

“Upon consideration of all the papers and circumstances of the case, it is apparent that, although the Appellant denies the facts of the Respondent being the wife, and *Saadat Ali* being the son, of *Fyz Ali Khan*, the late proprietor of the property, and the wit-

nesses of the Appellant affirm her denial, still, from the depositions of the witnesses alluded to in regard to no marriage having taken place, this is clear—that they have declared their not having witnessed the rite, but have not absolutely asserted that the pretensions adduced on the subject are wholly false; for instance, from the *futwa* of *Siraj-ood-den Ali Khan*, the former chief *Kazi*, and *Moulavie Syud Hamid-oollah*, the *moofiti* of this Court, in the suit of *Mirza Jan*, deceased, and *Mussumat Hurgane* and others, Appellants, *v.* *Mirza Azeem Ali* and *Hushmut Ali* and others, Respondents, bearing No. 1,546, which on the 16th of *January* 1822 was decided by *Thomas Goad*, Esq., and *William Dorin*, Esq., former judges of this Court, it appears that in marriage and relationship, evidence with reference to what has been heard is legal and admissible, i.e. if a person hear that a man and a woman associate together as wife and husband in one house, it is lawful for him to give evidence to the marriage of those two persons and this description of evidence is sufficient to prove the marriage of the woman, and the parentage of the child born of her, as attaching to the man; and it is manifest and evident from the letters of the former collectors, dated the 11th and 19th of *July* 1816, that at the time of the writing of the letters cited, there were two wives of *Fyz Ali Khan*, one of whom is *Shums-oon-Nissa*, and of the other wife, allowing that her name is not therein stated, still it is written ‘that she is living in the same house, and with *Fyz Ali Khan*, and for this reason it does not appear expedient that *Shums-oon-Nissa* should reside with the said *Khan*:’ and *Thekoor Das*, the guardian of *Fyz Ali Khan*, in his report dated the 9th of *Aghun* 1229, B.S., in reply to the *perwanna* of the Collector, which was

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issued to ascertain particulars connected with the two wives of *Fyz Ali Khan*, and whether there are such, clearly states, 'that *Rai Jan Khanum* is the other wife of *Fyz Ali Khan*, and was so previously to the marriage of *Shums-oon-Nissa*, and receives a monthly allowance from the Government: and that besides *Shums-oon-Nissa Khanum* and *Rai Jan Khanum* there is no other, nor has there been any other married wife of *Fyz Ali Khan*.' And from the reply written by the Appellant to a *perwanna*, and which is put up with the proceedings of the Provincial Court, it is obvious that there is not, and never even was, any slave woman of the name of *Heramum*. And the witnesses of the Appellant state that *Heramum* was the name of a woman who had died twenty-five years previous to their giving their evidence, which occurred in the year 1238, Bungla; therefore, if in truth there was a woman named *Heramum*, still from the year of her demise, which apparently occurred in the year 1212 or 1213 (1805-6, 7), to the time of the writing of the letters dated in the year 1816, answering to the year 1222, B.S., nine or ten years intervened; hence it is apparent, that the other wife residing in the same house with *Fyz Ali*, of whom mention is made in the letters of former collectors, is this very Respondent; and the allegation at present made by the Appellant, that the 'other wife' has reference to *Heramum*, is considered to be a downright falsehood. In the same way the letters of the collectors, and the report of *Thekoor Das*, guardian, from which are deducible a cheerful performance of the relative duties of husband and wife between *Rai Jan Khanum* and *Fyz Ali Khan*, the circumstance of the said *Khanum* being well known as his wife, are as good as witnesses of unquestionable veracity in establishing

the marriage of the Respondent and the parentage of *Saadat Ali* as attaching to *Fyz Ali Khan*; and further, from the depositions of the witnesses filed at the Collectorship, and from other exhibits of the Respondent, it appears that the Respondent always lived with *Fyz Ali Khan* in the manner usual with married women. For instance, in the year 1223 she came from *Gorai* to *Nuseerabad*, of which place *Fyz Ali Khan* was then a resident, and took up her residence, and they associated together as husband and wife; and in those circumstances she became pregnant, and in the month of *Poos* 1224, B.S., *Saadat Ali* was born of her venter. And the report of *Ram Chunder*, the guardian of *Fyz Ali Khan*, dated the 11th *Poos* 1224, B.S., on the subject of the Respondent's residing with *Fyz Ali Khan* for more than one year previous to the birth of *Saadat Ali*, affirms the depositions of the witnesses and other exhibits; and from the petition of the Respondent filed at the *Zilla* Court, and which the Appellant herself does not deny, it appears that the Respondent, at the time *Fyz Ali Khan* manifested his intention of marrying *Shums-oon-Nissa*, gave in a petition of opposition declaratory of her own conjugal affinity, and of *Fyz Ali Khan*'s intention to contract another marriage without the concurrence of the Respondent, contrary to the terms of her marriage settlement; although the petition alluded to was not approved, still no objection nor denial on the part of *Fyz Ali Khan*, and *Ramzan Beeby*, his mother, as to the conjugal affinity of the Respondent, is apparent: on the contrary, there is a total silence on the subject on their part; and *Meer Saadat Ali*, whose deposition has been taken agreeably to the order of this Court, has also clearly written in his petition, upon which an

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order was passed on the 2nd of April 1825, that *Shums-oon-Nissa Khanum* and *Rai Jan Khanum* are both wives of *Fyz Ali Khan*. From this it is also manifest that the Respondent, from the commencement, claimed conjugal affinity with the said *Khan*, and was universally known as being his wife; and the present allegation of *Meer Saadat Ali*, that *Fyz Ali Khan* did not marry *Mussumat Rai Khanum*, and did not associate with her, appears to be an unqualified falsehood; indeed, the assertion of the said witness, of his having heard the story of the Respondent's residence at *Gorai*, at the house of *Fyz Ali Khan*, from *Mussumat Ayeena*, his maternal aunt, at the age of twelve years, and of the residence of the Respondent at *Nuseerabad*, near the house, the dwelling-house of *Fyz Ali Khan*, prior and subsequent to the birth of *Saadat Ali*, and the admission of the witness, of his having protected the Respondent for the period of two years in his own house, are affirmatory of the justness of the claim of the Respondent, and of the collusion of the witness of the Appellant; but leaving these circumstances out of consideration, as the acknowledgment of *Fyz Ali Khan* of the filiation of *Saadat Ali* has been obtained in the manner in which the witnesses of the Respondent have deposed in this case, whether there be witnesses who saw the performance of the marriage rite or not, that acknowledgment of his furnishes certain proof of the parentage of *Saadat Ali*, and necessarily a consequent proof of the marriage of *Mussumat Rai Jan Khanum*, his mother, with *Fyz Ali Khan*, and these conclusions are to be deduced from the *futwa* of the former Chief *Kazi*, in the suit No. 1,546, and from the *futwa* of the present Chief *Kazi*, which at the requisition of the Judge of the Provincial Court has been filed in this

suit. Considering all these circumstances, in my opinion the Respondent is the wife of *Fyz Ali Khan*, and *Saadat Ali* is his son; and the claim of the Respondent, formerly Plaintiff, brought on her own account, and as guardian on account of *Saadat Ali Khan*, is just, and they and *Shums-oon-Nissa*, Appellant, have the right of obtaining the estate of *Fyz Ali Khan* on the ground of heirship, and the division of the property left by him between all three persons should be made agreeably to the law of inheritance. But as from the deed of marriage settlement filed by the Appellant, the genuineness of which the Respondent does not deny, it is apparent that *Fyz Ali Khan* contracted marriage with *Mussumat Shums-oon-Nissa* under a deed of marriage settlement of Rs. 9,000 and 500 gold *mohurs*, and in lieu of the third to be paid in advance, settled upon her the share of *Kismut Khona Deolee*, &c., and that the two-thirds to be paid afterwards have not yet been discharged, and that according to the *futwa* of the law-officers, the liquidation thereof has the priority of succession, therefore, the separation of the property detailed in the deed of marriage settlement on account of the third payable in advance, and the liquidation of the two-thirds, the payment of which was postponed, from the property left by *Fyz Ali Khan*, are necessary; and my opinion accords in every particular with the opinion recorded by *William Braddon*, Esq., a Judge of this Court: therefore it is ordered—That the Decree of the Provincial Court of *Juhangee-nagur*, dated 9th of May 1832, be amended and corrected in the following manner:—“That the property detailed in the deed of marriage settlement on account of the one-third payable promptly, be separated from the *mahals* in dispute if it be included therein, and whatever, according to cal-

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culatation, may be due on account of the two-thirds of the dower of the Appellant, the payment of which was postponed, be paid from the sum of one *lac* and Rs. 41,857. 12 *anas*, 15 *gundas*, 2 *kowries*, the amount profits deposited in the treasury of the Collectorship; that the share of the *zemindary* of *pergunna Atiya*, &c., the property left by *Fyz Ali*, and amount profits forthcoming in the Collector's treasury, having been divided into sixteen shares, one share be relinquished as the right of the Appellant on account of her conjugal affinity, and that one share of the right of the Respondent on account of her conjugal affinity, and fourteen shares, the right of *Saadat Ali Khan*, the minor son, being his right as the son (of the deceased), making together 15 shares, be decreed in favour of the Respondent, formerly Plaintiff, and that, upon the execution of the Decree of this Court, the Respondent have possession of a 15-*anas* portion of the *zemindary* and *talooks*, &c., detailed in the plaint, the property left by *Fyz Ali Khan*, and that she recover from the Appellant a 15-*anas* proportion of the amount of profits alluded to, and the amount collections of her share and of the share of *Saadat Ali Khan* from the period of the institution of the suit to the date of her obtaining possession as detailed in the Decree of the Provincial Court, and that the costs of both Courts be borne by the Appellant to the extent of the claim proved, and by the Respondent to the extent not proved."

From this Decree, *Shums-oon-Nissa Khanum* appealed to his late Majesty in Council.

After the commencement of the Appeal, the original Appellant died, and the Appeal was revived by her brother, the present Appellant, *Khajah Hidayut Oollah*.

The Appellant contended that the Decree was erroneous for the following reasons:—

I.—Because the Respondent has not proved either that she is the wife, or that *Saadat Ali* is the son, of *Fyz Ali Khan*.

II.—Because, in the absence of proof of the Respondent's marriage, her claims, and that of her son *Saadat Ali*, must entirely depend upon evidence of a direct and valid acknowledgment of the latter by *Fyz Ali Khan*, and because the evidence produced by the Respondent for the purpose of proving that acknowledgment is wholly unworthy of credit, and was in fact discredited by the Provincial Court, before which the evidence was taken.

III.—Because *Fyz Ali Khan*, from his state of imbecility of mind, was incompetent to make that acknowledgment of *Saadat Ali*, as his son, which is required by the Mahomedan Law in such a case.

The Respondent, on the other hand, submitted that the Decree was just and proper for the following reasons:—

I.—Because the marriage of the Respondent, *Rai Jan Khanum*, with *Fyz Ali Khan*, was satisfactorily proved, and there was no sufficient evidence to rebut the legal presumption thence arising, of the legitimacy of her son, *Saadat Ali Khan*.

II.—Because it was distinctly proved that *Saadat Ali Khan* was recognized by *Fyz Ali Khan* as his son, and such recognition (even without formal proof of a marriage) was sufficient to establish the legitimacy of *Saadat Ali Khan*, and the rights of the Respondents, as determined by the Decree of the Court below.

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Mr. *Charles Buller*, Mr. *Jackson*, and Mr. *Forsyth*,
for the Appellant ; and

Mr. *Wigram*, Q.C., Mr. *E. J. Lloyd*, and Mr.
Edmund F. Moore, for the Respondent.

The following cases and authorities were cited :—
Mihr Ali v. Kureemoonisa Begum (a). *Fyaz Ali Khan v. Mussumaut Fatima Khatoon* (b). *Mirza Qaim Ali Beg v. Mussumaut Hingun* (c). *Jeswunt Sing-jee Ubby Sing-jee v. Jet Sing-jee Ubby Sing-jee* (d). *Macnaghten's Principles of the Mahomedan Law*, 23, 90, 93, 297, 299. *N. B. E. Baillie's Mahomedan Law of Inheritance*, 34, 49.

The Right Hon. Dr. LUSHINGTON :

The claim in this case relates to the inheritance of the *zemindary* of *Atiya* ; and the claimants of that inheritance, at least all the claimants that it is necessary now to name, are two persons claiming to be the lawful widows of the deceased *Zemindar*, one of whom claims also on behalf of her son, whom she alleges to have been the legitimate issue of the deceased person.

Both the Courts, under whose consideration the questions in this cause have been brought, have come to the conclusion that the claim preferred by *Rai Jan* on behalf of herself and of her son, is a just one ; in other words, they consider there has been sufficient proof to justify them in determining that she was the lawful wife of the deceased *Zemindar*, and that her son was the lawful son of that *Zemindar*. It is hardly necessary to say that before their Lordships would reverse the Decree of two concurrent Courts, they must be perfectly satisfied that some legal miscarriage has taken

(a) 2 Ben. Sud. Dew. Reps. 112. (b) 1 Ben. Sud. Dew. Reps. 357.
(c) 3 Ben. Sud. Dew. Reps. 152. (d) *Ante*, p. 245.

place. But their Lordships are of opinion in this case that the evidence is decidedly in favour of the judgment to which those two Courts originally came.

The question appears to be one depending upon the law, with relation to Mahomedan property, and the proofs in support of the case are applied to that law. Several references have been made to the work of Mr. *Macnaghten* upon this subject. It will not be necessary to read at length the part of his preliminary remarks to which reference has been made, and which indeed has been already done ; but the substance of it appears to be this:—After having stated what is the general opinion entertained upon the question, he says—“The Mahomedan lawyers carry this disinclination (that is against bastardizing) much further ; they consider it the legitimate of reasoning to infer the existence of marriage from the proof of cohabitation.” He then says—“None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where by any possibility a marriage may be presumed, the law will rather do so than bastardize the issue, and whether a marriage be simply voidable or void *ab initio* the offspring of it will be deemed legitimate.” (P. xxiii. iv.)

It may be observed that this is the statement of Mr. *Macnaghten*, evidently after great deliberation upon the subject, because he goes on to refer to what has been said by *Sale* ; and he then observes—“This I apprehend, with all due deference, is carrying the doctrine to an extent unwarranted by law ; for where children are not born of women proved to be married to their

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fathers, or of female slaves to their fathers, some kind of evidence (however slight) is requisite to form a presumption of matrimony." (P. xxiv.) He then observes—"The mere fact of casual concubinage is not sufficient to establish legitimacy ; and if there be proved to have existed any insurmountable obstacle to the marriage of their putative father with their mother, the children, though not born of common women, will be considered bastards to all intents and purposes." (P. xxiv.) The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan Law, the presumption is in favour of such marriage having taken place.

We apprehend that in considering this question of Mahomedan Law we must, at least to a certain extent, be governed by the same principle of evidence which the Mussulman lawyers themselves would apply to the consideration of such a question. The first step in the case is the petition which has been so much commented upon at the Bar, namely, the petition of *Rai Jan*, bearing date the 11th of *December* 1813. In that petition she states herself to be the wife of *Fyz Ali Khan*, and she sets forth the marriage settlement without indeed ascribing to it any date or giving any date to the marriage. Having so done, she represents that the *Khan* was kept away and not permitted to return to his own house ; that there were a number of persons who had attempted to confine her, and not to permit her to go to the *Khan* ; and that he was about to marry another wife.

Now this document appears to their Lordships to be

a document of the very greatest importance, for without going the length of saying that it is a true assertion of all the facts therein contained, it is at any rate an assertion of facts, in conformity with the subsequent statement of this very person. The statement in this petition is made in the year 1813, before there is any anticipation of a litigation of this description, and it is made by her at a period when *Fyz Ali Khan* is not considered or deemed to be incompetent; it is addressed to a competent Court, and she must, if she anticipated any good result from the presentation of that petition, have also anticipated that the facts contained in that petition might be the subject of judicial examination. She, therefore, offers in the year 1813, to subject her claim (which is in substance the same as her claim now) to the examination of a competent Court to decide on it. It appears that this petition was rejected, and we presume on the ground that even supposing the whole facts contained in it to be true, yet that would be no justification for the interference of the Court, for the purpose of preventing the contemplated marriage.

In the year 1816, *Fyz Ali Khan* was placed under the protection of the Court of Wards. It is not necessary to go minutely into the question what was the precise state of his mind or of his intellect at that period. It is not distinctly raised in the course of the pleadings which were given in by the parties upon this occasion. But the result of the evidence appears to be, that he was a person who had become much addicted to habits of intoxication, and that his intellects were impaired, though it does not appear in any part of that evidence, that he had become what may be called an idiot. However, in 1816, his property, and also his person,

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were placed under the care of that Court, and proceedings have taken place, which have been much relied on, in both of the Courts below, in the determination of the questions which came under their consideration.

The first document to which it may be expedient to refer, is the report of Mr. *Pakenham*, the Collector, of the 19th of *July* 1816. Mr. *Pakenham*, in the discharge of his duty, in writing a letter to the Court of Wards, proposes to them a settlement out of the estate of *Fyz Ali Khan*, and after having mentioned certain circumstances relating to the amount of the property, he recommends the sum to be allotted for the expenses of *Fyz Ali Khan* and his family, to be fixed at 200 *rupees* a month, namely, 120 *rupees* for *Fyz Ali Khan*, his two wives, and his mother ; 30 *rupees* for the servants' wages ; and 50 *rupees* for the support of a number of females who have long lived in, and been maintained by, the family, and to whom he states that a sum equal to what he proposes has been for some time past allowed. He adds—" This last *item* I have not recommended without carefully ascertaining that there are such persons who, from having been all along supported by the *Zemindar*, may be considered as entitled to an allowance."

Now, without taking this as evidence of the fact, that she was the wife of *Fyz Ali Khan*, it is evidence to this effect, that so far as Mr. *Pakenham's* investigation had extended, it justified him in making the representation which he made, in the discharge of his duty, to the Court of Wards. The Court of Wards acted upon that representation, and *Rai Jan* continued to receive an allowance of 10 *rupees* a month, from the year 1817 up to the year 1824, when *Fyz Ali Khan* died.

It appears, further, that during this period, *Rai Jan* was residing at the house of *Fyz Ali Khan*, or, at least, in that part of the building appropriated to women belonging to *Fyz Ali Khan*. All the evidence, so far as it can be called evidence, goes to that extent, and, indeed, it appears scarcely to be a point in controversy. There is the report of Mr. *Scott*, who, it may be observed, is hostile to the claim of *Rai Jan*. He states, incidentally, for the purpose of justifying his advice, that the other wife should not be permitted to come into the household of *Fyz Ali Khan*; that this wife is now residing with him. He says:—"Now, as your ward has one wife living with him, as far as I am able to judge, any intercourse with another who has been so long absent, could in no degree add to his domestic comfort." It appears that *Shums-oon-Nissa*, the other wife, had been residing separately from her husband for a considerable time, and that she had presented a petition for the purpose of being allowed to return to him; and the ground upon which the Collector advises against that petition being complied with, is, that this wife, the present Respondent, was residing with him during that period, and that, therefore, the return of *Shums-oon-Nissa* would be unnecessary and inconvenient. There are several other documents of the same tenor, which it is unnecessary, in the view of their Lordships, to follow in detail, namely, the reports of the Collectors.

We apprehend then, that, in point of fact, the case comes clearly and indisputably to this—that this person, *Rai Jan*, was actually residing, during a period of seven years, in the female department of *Fyz Ali Khan*; that, according to the statements, so far as we can make them out, she was so residing for a twelvemonth

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anterior to the birth of this child taking place ; that while she so resided, she was recognized, to a certain extent, undoubtedly, as the wife of *Fyz Ali Khan* ; that the child was born under his roof, and that that child continued to be maintained in his house without any steps being taken on the part of *Fyz Ali Khan*, or of any one else, to repudiate his title to legitimacy as the offspring of *Fyz Ali Khan*.

If these facts be so proved, the question is, whether the evidence is not sufficient to support the legitimacy of the present claimant, *Saadat Ali Khan*, according to the law as laid down. In the opinion of the law-officers who were there consulted, they expressed themselves to the following effect :—“Under the above circumstances, in the event of the proof of these facts, that *Mussumat Rai Jan* associated with *Fyz Ali Khan*, and remained with the other females in the house of *Fyz Ali Khan*, and *Saadat Ali Khan* was born of her venter, being the offspring of the loins of the said *Fyz Ali Khan*, as is to be clearly understood from the proceeding of the Appeal Court of *Juhangee-nagur*, dated the 20th of *September 1821* :” they then go on to say that he would be the lawful child of *Fyz Ali Khan*, and that he and the mother would be entitled to claim their share of the inheritance.

Now all the facts which are there stated, upon the principle of assumption, appear to us to be maintained by the evidence in this case ; namely, that *Mussumat Rai Jan* did associate with *Fyz Ali Khan* ; that she did remain with the females of the house of *Fyz Ali Khan* ; that *Saadat Ali Khan* was born of her venter ; and, as to his being the offspring of *Fyz Ali Khan*, we think that is a circumstance necessary to be inferred from the previous facts.

With reference, then, to the law, as laid down by Mr. *Macnaghten*, and which appears to be acknowledged at the Bar to be law: without going into the question of the oral evidence, whether there was an express acknowledgment of the child by *Fyz Ali Khan*, as the son or not, there seems to be that which at least is tantamount to oral evidence of any declaration, because there is a consecutive course of treatment, both of the mother and of the child, for a period of between seven and eight years, under circumstances, in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been continued, except from the presumption of the cohabitation, and of the son being the issue of the loins of *Fyz Ali Khan*. But their Lordships are not disposed to think that the whole of the testimony, with regard to the verbal acknowledgment of *Saadat Ali Khan*, ought to be rejected. It is not necessary, however, to decide the case upon that ground, because we think, for the reasons I have stated, and without receiving as evidence, that which is not legitimate or credible evidence, there are sufficient facts either admitted by both parties, or proved by the treatment and the whole *res gestae* in the case, to bring it within the principles of law, which have been already adverted to, and that, therefore, the Judgment of the Court below must be affirmed, with costs.

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KHANUM.

JUVEER-BHAAEE and others - - - Appellants,

AND

VURUJ-BHAAEE and others - - - Respondents.*

On Appeal from the Sudder Dewanny Court at Bombay.

Appeal to Privy Council—Improper exclusion and suppression of evidence by trial court—Interference—Remand.

Where the Judge of the Court below, improperly suppressed documents,

Where the Judge of the Court below, improperly suppressed documents, which were not discovered until after the transmission of the Appeal to Her Majesty in Council, their Lordships refused to give an opinion on the merits, and remitted the cause to the *Sudder Dewanny Court*, for reconsideration.

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August
1844.

THIS suit was originally instituted in the *Zilla Court* at *Kaira*, by the Respondents against the Appellants. The Plaintiffs claimed to be a joint undivided family with the Defendants, and prayed for a partition and distribution of the joint estate. Evidence of a conflicting character was entered into on both sides, and Mr. *Grant*, the then Judge of the *Kaira Court*, in accordance with the *Bombay Regulation IV. of 1827, sec. 24*, referred the whole of the evidence to a *Punchayet*. Mr. *Grant* was afterwards removed from the *Kaira Court* to the *Ahmedabad Court*, and Mr. *Bell* was appointed Judge of the *Kaira Court* in his stead.

It appeared that, on the 5th of *December 1827*, the Defendant, *Gulla-bhaee Valla-bhaee*, presented a petition to Mr. *Bell*, objecting to the mode of examination which Mr. *Grant* had adopted, on the hearing of this case, and stating that that Judge had refused to take the depositions of some of the witnesses cited by him, for the purpose of proving that the property in question

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

had been acquired by one *Bapoo-jee*. The petition also stated, that the persons who had been appointed members of the *Punchayet* were friends and relations of the Respondents; that the case was not a proper one to refer to a *Punchayet*, and that the reference made to them had been without the consent of the petitioner. It would appear from the Order made by Mr. *Bell*, as endorsed upon the petition, that the Judge reserved the consideration of these objections until the hearing of the cause.

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This petition and order were numbered 312 on the file of the suit

On the 11th of *January* 1828, the *Punchayet* made their report, in which they declared that the majority of the title-deeds produced by the Respondents were genuine.

On the 26th of *February* 1828, the Defendant, *Gulla-bhaee*, presented another petition to Mr. *Bell*, which reiterated the allegations contained in the last-mentioned petition, and distinctly alleged that the reference to the *Punchayet* was the consequence of a combination between the Respondents and *Sooruj Ram*, the *Mokhtar* of the heirs of *Raga-bhaee* and one *Lukmi Ram*, the native agent to Mr. *Grant*. Mr. *Bell* endorsed an Order on this petition, that it should be brought forward at the hearing of this cause; it appeared, however, that neither the original petition nor the Order made upon it were ever filed with the other proceedings in the cause.

The Defendant, *Gulla-bhaee*, subsequently presented two other petitions, dated the 30th of *April* and 19th of *June* 1828, again impugning the conduct of Mr. *Grant*, and insisting that the members of the *Punchayet* were friends and relations of the Respondents, and

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had been appointed without his consent. No Order was made upon these petitions, which were respectively numbered 313 and 319 on the file of the proceedings.

Before the cause came on for hearing, the *Zilla* Court of *Kaira* was abolished, and the suit being transferred to the *Zilla* Court of *Ahmedabad*, the whole of the papers and proceedings, including the above-mentioned petitions (Nos. 312, 313, 319), were forwarded to the last-mentioned Court. In consequence of this arrangement, the cause again came within the jurisdiction of Mr. *Grant*.

The Decree of the *Zilla* Court, bearing date the 1st of *February* 1829, declared that both the Respondents and *Gulla-bhaee* and his co-heirs were jointly interested in the property, and the claim of the Respondents was consequently allowed with costs.

Gulla-bhaee appealed to the *Sudder Dewanny Adawlut*, which Court subsequently affirmed this Decree.

It afterwards appeared that, in forwarding the proceedings and documents in this suit to the *Sudder Adawlut*, Mr. *Grant* withdrew and suppressed from among the proceedings the three petitions numbered 312, 313, and 319, and falsified the record of the proceedings received by him from the *Zilla* Court of *Kaira*, with the view of excluding all mention of those petitions. One important effect of the suppression of the three petitions was, that in the absence of those petitions it appeared as if *Gulla-bhaee Valla-bhaee*, instead of objecting from the first to the reference to the *Punchayet*, had acquiesced in that reference until he found its decision was against him; while, on the contrary, the fact was, that he always protested against such a submission of the case.

A transcript of all the proceedings in the suit, as altered by Mr. *Grant*, together with all the papers and documents, with the exception of the three petitions before-mentioned, were transmitted by the *Sudder Adawlut* to His late Majesty in Council.

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In the year 1837 the judicial conduct of Mr. *Grant* became the subject of a lengthened investigation on the part of the Government of *Bombay*. The suppression of the above-mentioned petitions, Nos. 312, 313, and 319, and the alteration of the record so as to exclude all reference to those documents, constituted one of the charges against him. The Commission appointed by Government to conduct the inquiry, reported that Mr. *Grant* was guilty of this and other charges brought against him, and in consequence of this report, the Government suspended him from office.

The *Bombay* Government subsequently referred the case to the *Sudder Dewanny Adawlut* of that Presidency, in order that further proceedings might, if necessary, be held for the purpose of being laid before Her Majesty in Council. The *Sudder Adawlut* recommended that a translation of the suppressed documents, a complete copy of the proceedings of the Commission, and the opinion of the Government respecting Mr. *Grant's* conduct, with their reasons for suspending him from the public service, should at once be forwarded, in order to be laid before Her Majesty in Council.

This was accordingly done, and the Appeal now came on for hearing on the whole case.

Mr. *Wigram*, Q. C., Mr. *Jackson*, and Mr. *Forsyth*,
for the Appellants; and

Mr. *Burge*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents,

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Lord LANGDALE:

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Their Lordships have taken the circumstances of this case into their consideration, and looking into the conduct pursued by the Judge, in suppressing from the *Sudder Dewanny Adawlut*, certain documents which had been proved in the Court below, their Lordships are of opinion that the case was never properly presented to the consideration of that Court, and consequently that that Court had not the means, which they ought to have had, of forming their judgment upon it. For this reason their Lordships are of opinion that this cause must be remitted back to the *Sudder Dewanny Adawlut*, with a direction that that Court take into their consideration such allegations as were contained in the several petitions of the Appellants, and investigate the matters therein alleged in such a manner as to them may seem best.

Certain costs have been incurred in consequence of the conduct of Mr. *Grant*. That being so, and Mr. *Grant* having been an officer of the East India Company, it seems to be worthy of their consideration how far they will have regard to the costs which the parties have been put to, in consequence of the misconduct of their Judge.

HOSANNA ARATHOON KERAKOOSSE - - Appellant,

AND

WILLIAM AMBROSE SERLE and others - Respondents.*

*On Appeal from the Supreme Court of Judicature at
Madras.*

Heard *Ex parte*.

Public policy—Order of Supreme Court opposed to—Validity of—Public officer of court acting as next friend of survivor in matters in which he has personal interest—Propriety of.

By a General Order, made on the Equity side of the Supreme Court of *Madras*, it was ordered that, "Whenever it shall appear, that the property of any infant is unprotected, and not secured for his or her benefit, the Registrar shall, with the previous consent of the Court, or a Judge, institute proceedings on behalf of such infant, for the purpose of protecting his or her person or property." In pursuance of this Order, the Registrar of the Supreme Court, upon Petition, obtained an Order giving him liberty to file a Bill in the Equity side of the Supreme Court, as the next friend, and on behalf of infants, for an account of the estate of their father, who died intestate, against their mother, the administratrix; and notwithstanding an Appeal against such Order, such Bill was filed, to which the Defendant put in a plea, which being overruled, a further Appeal from such decision was interposed to Her Majesty in Council.

By the practice of the Supreme Court, the Registrar is entitled to a commission of 5 per cent. on all sums of money paid into Court.

Held by the Judicial Committee, that the Order of the Equity side of the Supreme Court, being made under the general jurisdiction of the Supreme Court, and not under the Statute 2 & 3 *Vict.*, c. 34, was void, it being against public policy to allow an officer of the Court to institute suits, in the conduct of which he might have a direct personal interest, and the Orders made in pursuance thereof, reversed.

THIS was an Appeal from two Orders of the Supreme Court at *Madras*, bearing date, respectively, the 26th of *September* 1843, and the 13th of *February* 1844. The first Order was made on the petition of the Registrar of the Supreme Court, giving him authority to institute a suit, as the next friend of the infant chil-

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* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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dren of the Appellant, against her. The second was an Order of the same Court, disallowing a plea put in by the Appellant, to the Bill so filed by the Registrar, on behalf of the infants.

These Orders were made, under the following circumstances:—

Arathoon Kerakoose, an Armenian, inhabitant of *Madras*, departed this life intestate, on the 21st of *May* 1832, leaving the Appellant, his widow, and the Respondents, *Moses Kerakoose*, *Arrahcheal Kerakoose*, *Barbara Kerakoose*, *Harapeat Kerakoose*, *Katherina Kerakoose*, and *Jacob Kerakoose*, respectively, under the age of twenty-one years, his only children, him surviving.

On the 16th day of *August* 1832, letters of administration to the goods, chattels, credit and effects of the intestate were granted on the Ecclesiastical side of the Supreme Court at *Madras*, to the Appellant, as the widow of the intestate. And the Appellant gave the proper security required by the Charter or Letters Patent establishing the Supreme Court, in a bond, with sureties for the sum of £100,000.*

* By the Charter or Letters Patent of his late Majesty King *George* the Third, dated the 26th day of *December* 1800, after reciting a Charter of his late Majesty, King *George* the Second, erecting a Court, to be called the Mayor's Court of *Madraspatnam*. And reciting, also, an Act of Parliament passed in the thirty-seventh year of the reign of his late Majesty, King *George* the Third, entitled, "An act for the better administration of justice at *Calcutta*, *Madras*, and *Bombay*, and for Preventing British subjects from being concerned in loans to the native princes of *India*," whereby it was, amongst other things, enacted, that it should be lawful for his said late Majesty, by Charter, to erect a Court of Judicature at *Madras*, to be presided over by a person, to be styled the Recorder of *Madras*. And that the said Court should have full power and authority to exercise and perform all civil, criminal, ecclesiastical, and admiralty jurisdiction, and to appoint such ministerial officers as might be necessary, and to form and establish such rules of practice, and such

No citation or demand for filing any accounts of, or relating to, the estate or effects of the intestate was

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rules for the process of the said Court, and to do all such other things as should be necessary for the administration of justice. And reciting, also, that by Letters Patent, dated the 20th day of *February*, in the thirty-eighth year of the reign of his late Majesty, King *George* the Third, the said Court of the Recorder at *Madras* was erected in pursuance of the said last-mentioned Act of Parliament. And also reciting an Act of Parliament, passed in the fortieth year of the reign of his said late Majesty, entituled, "An act for establishing further regulations for the government of the British territories in *India*, and the better administration of justice within the same," whereby his Majesty was empowered to erect and establish a Supreme Court of Judicature at *Madras*, as in the said Act of Parliament mentioned. His Majesty, King *George* the Third, did grant, direct, ordain, and appoint, that there should be within the settlement of *Fort St. George*, a Court of Record, which should be called the Supreme Court of Judicature at *Madras*. It was by the said Charter (amongst other things) declared, that the said Supreme Court of Judicature at *Madras* should have full power and authority, to hear, try, and determine all and all manner of suits and actions, either civil or criminal, which, by the authority of any Act or Acts of Parliament, or under the authority of the said Letters Patent, of the thirty-eighth year of the reign of his said late Majesty, might then be tried or determined by the said Court of the Recorder at *Madras*, and that all powers, authorities, and jurisdictions of what kind or nature soever, which, by any Act or Acts of Parliament, or by the said Letters Patent, might be, or were, directed to be exercised by the said Court of the Recorder at *Madras*, should and might be as fully and effectually exercised by the said Supreme Court of Judicature at *Madras* as the same might have been exercised and enjoyed by the said Court of the Recorder at *Madras*. And by the said Charter of the said Supreme Court of Judicature at *Madras*, is (amongst other things) appointed a Court of Ecclesiastical Jurisdiction, with power to commit letters of administration, under the seal of the said Court, of the goods, chattels, and all other effects whatsoever, of persons who should die intestate. And it was by the said Charter enjoined and required, that every person to whom such letters of administration should be committed (other than the Registrar of the said Court taking administration under the authority of the Act of Parliament of the fortieth year of the reign

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ever served or made upon the Appellant, previously to her filing such accounts as hereinafter mentioned.

of his late Majesty, King *George* the Third, mentioned in the said Charter), should, before the granting thereof, give sufficient security by bond to the Registrar or chief clerk of the said Court, for the payment of a competent sum of money, with two or more able sureties, respect being had in the sum therein to be contained, and in the ability of the sureties to the value of the estate, credits, and effects of the deceased. Which bond should be deposited in the said Court among the records thereof, and there safely kept, and a copy thereof should also be recorded among the proceedings of the said Court. And the condition of the said bond should be to the following effect (that is say):—"That if the above bounden administrator of the goods and effects of the deceased do make or cause
 "to be made a true and perfect inventory of all and singular the
 "goods, chattels, credits, and effects of the said deceased, which
 "have or shall come to the hands, possession, or knowledge of
 "him, the said administrator, or the hands or possession of any
 "other person or persons for him, and the same so made do exhibit or cause to be exhibited into the Supreme Court of Judicature at *Madras*, at or before a day therein to be specified. And
 "the same goods, chattels, credits, and effects of the deceased at
 "the time of his death, or which at any time afterwards shall come
 "to the hands or possession of such administrator, or to the hands
 "of any person or persons for him, shall well and truly administer
 "according to law. And further, shall make or cause to be made a
 "true and just account of his said administration at or before a time
 "therein to be specified. And all the rest and residue of the said
 "goods, chattels, credits, and effects which shall be found remaining
 "upon the said administration account, the same being first examined
 "and allowed of by the said Supreme Court of Judicature at
 "*Madras*, shall deliver and pay unto such person or persons respectively, as shall be lawfully intitled to such residue. Then this
 "obligation to be void and of none effect, or else to remain in full
 "force and virtue.

And by the said Charter, it is provided that in case it should be necessary to put the said bond in suit, for the sake of obtaining the effect thereof, for the benefit of any person or persons who should appear, to the said Supreme Court, to be interested therein, such person or persons, from time to time, paying all such costs as should arise from the said suit, or any part thereof, such person or persons

On the 6th of *May* 1843, certain rules of the Supreme Court, on the Ecclesiastical side thereof, were passed, which were as follows:—

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“Supreme Court, Ecclesiastical side,
6th *May* 1843.

“It is ordered, that the following rules on the Ecclesiastical side of this Court do take effect immediately:—

“1st. In all cases in which letters of administration have been taken out since the 1st of *January* 1823, and in which the time for filing accounts has expired, such accounts shall be filed within two months after the publication of this Order, in the *Fort St. George Gazette*; and in default of such accounts being so filed, the Registrar may issue the necessary citations, and other process, to compel the filing thereof, charging the parties making default, with the costs of such citations and process.

“2nd. The Registrar shall publish in the *Fort St. George Gazette* on the first Tuesday in every month, a schedule, or list, of all accounts filed in his office during the preceding month, showing the balance of each account in the hands of the administrator.

“3rd. In all cases in which administrators shall hereafter neglect to file their accounts for two months beyond the time allowed to them by law, the Registrar is ordered to issue the necessary citations, and other process, to compel the filing thereof, charging the

should, by order of the said Court, be allowed to sue the same in the name of the obligee. And that the said bond should not be sued in any other manner. And the said Supreme Court was authorized to order, that the said bond should be put in suit, in the name of the Registrar or chief clerk, or his executors or administrators.

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parties making default, with the costs of such citations and process.

“4th. Administrators shall pass their accounts before the Master, and obtain the Master’s certificate of his allowance of the same; in all cases, in which the Court or a Judge shall think fit to make an Order to that effect, such Order to be made either at the suggestion of the Registrar, or on the application of any person interested in such accounts.

“5th. In all cases where an administrator shall be required to pass his accounts, the Master shall publish a notice, in the *Fort St. George Gazette*, of the day and hour when such administrator is required to attend before him, at which time all persons interested may appear by themselves or their attorneys, and make their objection to such accounts.”

On the same day, the following General Order of the Supreme Court was made on the Equity side:—

“It is ordered that the following Order on the Equity side of this Court do take effect immediately:—

“Whenever it shall appear that the property of any infant is unprotected, and not secured for his or her benefit, the Registrar shall, with the previous consent of the Court or a Judge, institute proceedings on behalf of such infant, for the purpose of protecting his or her person or property.”*

* By the Charter, it is ordained and established, that the said Supreme Court of Judicature at *Madras* should also be a Court of Equity, and have full power and authority to administer justice in a summary way, according, or as near as might be, to the rules and proceedings of the High Court of Chancery in *Great Britain*, and upon a bill filed, to issue subpoenas and other process, under the seal of the said Court, to compel the appearance and answer upon oath of the parties therein complained against, and obedience to the decrees and orders of the said Court of Equity, in such manner and

In pursuance of the first of the aforesaid Rules, on the Ecclesiastical side of the Supreme Court, the Ap- 1844.
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form, and to such effect, as the Lord High Chancellor of *Great Britain* did, or lawfully might, under the Great Seal of *Great Britain*, or as near the same as the circumstances and conditions of the places and persons under their jurisdiction, and the laws, manners, customs, and usages of the native inhabitants, would admit. And the said Supreme Court of Judicature at *Madras* was thereby authorized to appoint guardians and keepers for infants and their estates, according to the order and course observed in that part of *Great Britain* called *England*.

By an Act of Parliament made and passed in the 2nd and 3rd years of the reign of Her present Majesty, after reciting that the Supreme Court of Judicature at *Fort William* in *Bengal*, on the 15th day of *June* 1837, and the Supreme Court of Judicature at *Madras*, on the 22nd day of *February* 1837, had made and passed certain rules and orders, whereby the modes of pleading in the same Courts respectively, were in some respects altered, and that doubts had arisen as to the powers of the same Courts to make such alterations without the authority of Parliament it was enacted that the said rules and orders, so far as they altered the modes of pleading in the said Supreme Courts at *Fort William* and *Madras* respectively, should be deemed and taken to all intents to have been lawfully made, and to have had, and still to have, the force of law. And it was by the same Act also (amongst other things) enacted, that the said Supreme Courts of *Fort William* and *Madras* should and might, by any other rules or orders to be from time to time passed by the said Courts respectively, make such further alterations in the mode of pleading in the said Courts respectively or in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, or suits in equity, or any civil or ecclesiastical causes, and such regulations as to the payment of costs, and otherwise for carrying into effect any such alterations as to the said Courts respectively might seem expedient, and that such rules, orders, or regulations should be submitted for confirmation or disallowance to the Governor-General of *India* in Council, immediately upon the making of the same, and every such rule, order, or regulation, should to all intents and purposes have full effect after it should have been confirmed by the said Governor-General of *India* in Council; but every such rule, order, and regulation, when so confirmed, should be transmitted to Her Majesty, her heirs or successors, in Council, and should be subject at any time to be altered or rescinded by Her said Majesty, her heirs or successors, in Council.

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pellant, on the 25th of *August* 1843, and before the expiration of two months from the publication of the rules, filed her account, as the administratrix of the estate and effects of the intestate.

Shortly after filing the aforesaid account, the Appellant received a letter, dated the 31st of *August* 1843, from *William Ambrose Serle*, as the Ecclesiastical Registrar of the said Supreme Court, in the following form:—"Supreme Court, *Madras*, Registrar's Office, 31st *August* 1843. Madam, —Adverting to your account of the late *Arathoon Kerakoose*, Esq., deceased, filed this day, I am sorry to observe that it is altogether objectionable, inasmuch as it is more an abstract of the account, than a full and perfect account, required by the Court; I have, therefore, to request that you will be pleased to file an account of the estate fully and separately, particularizing the dates and amounts of the several items of your receipts and disbursements thereof respectively, and this I beg you will do on or before the 12th day of *September* next, otherwise I shall be obliged, under the orders of the Supreme Court, dated 6th *May* last, to apply to the Court, or a Judge thereof, that you do pass your accounts before the Master, and oblige you to obtain the Master's certificate of his allowance thereof. I am, Madam, your obedient servant, W. A. SERLE, Registrar.—To Mrs. *Hosanna A. Kerakoose*, Administratrix of the estate of the late *Arathoon Kerakoose*, Esq., deceased."

The Appellant being advised that she was not bound to render accounts of or relating to the estate of the intestate in the Ecclesiastical side of the said Supreme Court, except at the instance of some person interested in such estate, and no proceedings having been

taken against her, nor any application made to her by ^{1844.}
 or on behalf of any person interested in such estate to ^{KERAKOOSE}
 render such accounts, the Appellant declined to ren- ^{7.} SERLE and
 der such further accounts as required in the aforesaid others.
 letter.

In consequence of this refusal, *Serle*, as Registrar of the Supreme Court, on the Ecclesiastical side, on the 12th day of *September* 1843, presented a petition to the Court, for liberty to file a bill as the next friend, and on behalf of the infants, the children of the intestate, praying for an account of the estate of the intestate, and that their shares might be secured for their benefit respectively.

This petition came on to be heard before the Supreme Court, on the 22nd of *September* 1843 ; when the Appellant objected that no such order as prayed for, ought to be made, and insisted particularly that such order ought not to be made in the exercise of the Equity jurisdiction of the Court, on the petition of *Serle*, as the Registrar of the Court, on the Ecclesiastical side thereof. That if any proceedings were to be taken by *Serle*, as such Registrar, to compel the Appellant to render her accounts as such administratrix, such proceedings ought to have been taken by such Registrar, of the nature and in the manner pointed out by the fourth of the above rules.

On the 26th of *September* 1843, the Supreme Court ordered and directed, that the petition of *Serle*, so far as regarded the addition to the name of *William Ambrose Serle* therein, should be amended, by striking out therefrom the words "on the Ecclesiastical side thereof," and substituting the words "for the time being," in lieu thereof. And that *Serle*, as the Registrar of the Supreme Court for the time being, should be at liberty to file a

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bill in the Court, as the next friend of, and on behalf of, the said infants, praying for an account of the estate of *Arathoon Kerakoose*, deceased, and that the shares of the infants should be secured for their benefit respectively.

The Appellant presented a petition to the Supreme Court, praying for leave to appeal from this Order of the 26th day of *September* 1843, to Her Majesty in Council, and such leave was given accordingly by an Order dated the 13th day of *October* 1843.

Notwithstanding the appeal against this Order of the 26th *September* 1843, a bill of complaint was, on the 7th day of *October* 1843, filed in the Supreme Court, on the Equity side thereof, in which *Moses Kerakoose*, *Arracheal Kerakoose*, *Barbara Kerakoose*, *Harapeet Kerakoose*, *Katherina Kerakoose*, and *Jacob Kerakoose*, by the said *William Ambrose Serle*, as the Registrar of the Supreme Court for the time being, their next friend, were Plaintiffs, and the Appellant was Defendant, praying that an account might be taken of the estate of the deceased, which had been possessed by or come to the hands of the Appellant, or which had been possessed by or come to the hands of any other person or persons, by her order or for her use ; and that an account might be taken of the deceased's funeral expenses and debts, and that the same might be paid out of the personal estate ; and that an account might be taken of the deceased's houses and lands, which had come to the hands of or been received by, or by the order, or to the use, of the Appellant ; and that the surplus of the personal estate of the deceased, and the rents, profits, and produce of the houses and lands, might be applied in a due course of administration ; and that the shares of the Plaintiffs therein, and in

the said houses and lands, might be secured for their benefit respectively ; and that some proper person might be appointed by the Court, to collect in and receive the outstanding personal estate and effects of the intestate, and the interest of the Government and other securities, and the rents, issues and profits of the houses and lands for the time to come: and that a guardian of the persons and fortunes of the Plaintiffs might be appointed by the Court, and that a suitable allowance might be made for the maintenance and education of the Plaintiffs for the time past and to come ; and that the Appellant might be restrained by the order and injunction of the Court from trading with the funds of the estate, and from lending out or investing the same, or any part thereof, in or upon any securities other than Government or real securities ; and from further collecting the rents, issues, and profits of the real estate of the intestate, and the interest on the Government and other securities, belonging to the estate ; and for further relief.

The Appellant having been served with process, duly appeared to the bill, and on the 4th day of *December* 1843 filed her plea thereto, whereby she showed and alleged that the said *William Ambrose Serle*, as the Registrar on the Ecclesiastical side of the said Court, had no right to demand such account of administrations to be filed, as he had by his letter of the 31st day of *August* last, to the Appellant, demanded ; that the said *William Ambrose Serle* had not any right whatever, as such Registrar on the Ecclesiastical side of the Court, or otherwise, or in any other capacity, to present to the Court such petition as therein and hereinbefore stated, for leave to file such a bill as prayed by his petition, nor any right whatever

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to file such a Bill as he had filed, to prosecute the said suit against the Appellant; that the Court had no jurisdiction to grant such Order, whereby the said *William Ambrose Serle* was permitted to commence and prosecute such suit as aforesaid; that no person could or ought to be allowed to sue as a *prochein ami* except upon his own responsibility, and the responsibility of costs, in respect of the grounds of such suit, and his conduct in the same, and not upon any leave or order of the Court; and that the said *William Ambrose Serle* ought not to have been allowed, by leave of the Court, to sue by the bill as *prochein ami*, without limitation as to the nature or quality of the bill, and the allegations and charges therein contained, or to be contained, and without any responsibility as to costs, and at the cost either of the Appellant or of the estate, he, the said *William Ambrose Serle*, having no interest in maintaining the suit, except the fees which in the progress of the suit would become payable to him as the Registrar. Whereupon, for want of a proper person entitled to sue as a *prochein ami*, who would be responsible for costs, the Appellant humbly prayed the judgment of the Court, whether she ought to be compelled to make any further or other answer to the said bill of complaint.

This plea was argued before the Supreme Court, and on the 13th *February* 1844 it was ordered by the Court that the plea should be overruled.

The Appellant presented her petition to the Supreme Court, praying for leave to appeal from this Order to Her Majesty in Council, and such leave was given accordingly.

Mr. *F. Kelly*, Q. C., Mr. *Teed*, Q. C., and ^{1844.}
 Mr. *Dickenson*, for the Appellant in the first KERAKOOSE
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The Supreme Court of *Madras* had no authority by virtue of the charter of *December* 1800,* or by the 2nd & 3rd *Vict.*, c. 34,† to have made, on the Equity side of the Court, the Order of the 6th of *May* 1843, inasmuch as such Order did not relate to the practice or rules of pleading of the Court, or to process, to be issued by or under the authority of the Court. Such an Order is against public policy. The appointment of an officer of the Court who is pecuniarily interested in the institution of suits, to be the next friend of infants, is in itself contrary to law. Here the Respondent, as Registrar of the Court, is entitled not only to fees on all business transacted by him as such Registrar, but also to a commission of five per cent. on all money paid into Court; and if the suit instituted by him, in pursuance of the Order of the 6th *September* 1843, be prosecuted, he will receive by way of commission on the amount so to be paid into Court, the sum of £3,500, in addition to other fees payable to him as such Registrar. By reason of this large commission, the suit, and the proceedings by the Order directed to be instituted, are for his benefit, and will not be beneficial for the infants. Another and equally strong reason exists against such Order; the Registrar is not made by such Order responsible for the costs, of any suit instituted by him, as the next friend of any infant or infants, but such costs must be borne, either in part or wholly by the Defendant or the infant's estate. And in case such infants attain their majority, and desire

* *Ante*, p. 330.

† *Ante*, p. 335.

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such suit to be discontinued, they must pay to the Registrar his costs up to that time. No suit ought to be instituted by any person, as next friend, for an infant or infants, unless such next friend is made responsible for the costs of such suit. Irrespective of such Order being void as against public policy, it is irregular and contrary to the practice of the Court of Chancery. The Supreme Court had no authority to make such Order on petition.—The only jurisdiction of the Court was by Bill. [Lord *Langdale*: Suppose the Registrar had filed a petition for leave to file a Bill. Petitions for guardians are of every-day occurrence without a Bill being filed. The practice here is to appoint a guardian, and if the guardian thinks it for the benefit of the infant that a suit be instituted, he petitions the Court for leave to file such. A Bill is in truth a Petition.] Even if the Court had jurisdiction to make such an Order, on the petition of the Registrar, on the Equity side of the Court, yet no such Order ought to have been made on the petition of the Registrar on the Ecclesiastical side of the Court. The petition ought at once to have been dismissed, and ought not to have been amended by striking out the words “on the Ecclesiastical side thereof,” and substituting the words “for the time being,” in lieu thereof. [Lord *Campbell*: Has the Order of the 6th of *May* 1843 ever been confirmed, as required by the 2nd & 3rd *Vict.*, c. 34? I think it never ought to have been confirmed.] No; but it may be said that the Order was not made under that Act, but under the general jurisdiction of the Court as a Court of Chancery.

The second Appeal, which disallowed the plea to the Bill, was not argued. The same counsel appeared in support of that Appeal.

The Right Hon. T. PEMBERTON LEIGH:

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These appeals are brought by a lady of the name of *Kerakoose*, against two Orders of the Supreme Court of Judicature of *Madras*. The first Order complained of was pronounced on the 26th *September* 1843, and was made on the petition of the Registrar of the Court. It gave the consent of the Court to the institution of a suit in Chancery against the Appellant by the petitioner on behalf of the infant children of the Appellant. The second Order is dated the 13th *February* 1845, and disallows a plea put in by the Appellant, to a Bill filed against her by the Registrar, in the name of the infants, in pursuance of the liberty given by the preceding Order.

It has been argued at the Bar that the first Order, independently of all other objections to it, is invalid, as having been made upon petition without the existence of any suit to found the jurisdiction of the Court. We cannot concur in this objection.

By a general Order of the Court, made on the 6th of *May* 1843, the Registrar was directed to institute proceedings, with the previous consent of the Court, in all cases where the property of infants should appear to be unprotected. With a view to obtain this consent in the present case, the Registrar presented a petition to the Court, and it is plain that this was the only proper mode of making the application.

No question of jurisdiction arises. Notice of the application was given to the Appellant for the purpose of enabling her, if she thought fit, to appear and show cause against it. She did think fit to appear, and did offer reasons against the Order, which the Court held to be insufficient. No process was issued to compel

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appearance, nor was any Order sought to be made upon her. It is perfectly familiar to the practice of the Court of Chancery, when an Order is applied for, which may be made *ex parte*, to direct notice of the application to be given to the party who may be affected by it, to the intent that such party, though not subject to the jurisdiction of the Court, may appear, if he pleases, to protect his interests; and this is what in substance appears to have been done in this case.

It was then said, that upon the merits of the case, as they appeared before the Court, there was no ground for permitting any Bill to be filed against the Appellant, in order to protect the property of the infants.

We are not of that opinion. This lady had rendered an account which was either full nor satisfactory, and she had refused, when called upon, to give the further detail, without which it was impossible to see either that the assets which she had parted with, had been properly disposed of, or that which remained, so far as it belonged to the infants, was properly secured.

But upon general principles, we think that the Order in question must be reversed. It is founded on the general Order of the 6th *May* 1843, and the merits of that Order appear, therefore, to be involved in the present appeal. We understand this Order to have been made under the general jurisdiction of the Court to regulate its practice, and not under the powers given by the Statute of the 2nd & 3rd *Vict.*, c. 34. The Order does not appear to have been transmitted to this country, and we are informed, that it has never been submitted to the Governor in Council.

Upon the general policy of this appointment of a public officer to institute suits on behalf of infants, in all cases where their property appears to be unpro-

tected, we are not called upon to give an opinion. In this country the protection of such interests is left to persons who may be willing to come forward at the risk of costs, and, subject to that risk, any person is permitted to do so. That this practice gives rise to many improper suits is well known to all who have any experience in the Court of Chancery; and it is very probable that it leaves many cases unprovided for, when the interests of the infants would require the protection of a suit. It may well be, that the abuses which prevail in *Madras*, in the administration of infant estates, and the state of society in that country, may require measures which have not been deemed necessary in *England*, and this consideration seems to have dictated the Order of the 6th of May. But the question is one of very great public importance, regarding not the conduct of suits after they are instituted, but the appointment of a public officer to institute suits, and if it was considered by the Court that it was advisable to make such a representative, and that it had authority to make it, we think it should have been done under the provisions of the Statute of *Victoria*, in which case the Regulation would have been subject to be altered or rescinded by Her Majesty in Council.

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But whatever may be the propriety of making provision by the appointment of a public officer for the institution of suits on behalf of infants, it is of the utmost importance that no person should be appointed for that purpose, of whom even a suspicion can exist, that he may be biassed by any personal interest, either in the institution of the suit or in the mode of conducting it. It is stated to us that Mr. *Serle*, by reason of the office which he holds, will both receive fees

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upon the different proceedings in this cause, and a commission upon the amount of the monies paid into Court. This fact is adverted to in general terms by the Appellant in her papers in the Court below, and is urged as one of the objections to the institution of the suit. It does not appear from any of the Orders, or from the Judgment of the Court, that any provision has been made, or is intended to be made, with respect to the fees, or the commission which may become due to Mr. *Serle*, in this or other cases in which he may sue as next friend. It is plain, therefore, that he has a strong personal interest both in the institution of suits, and in the mode of conducting them, and especially in one of the most delicate points upon which a next friend can be required to exercise a discretion, viz., the propriety or impropriety of requiring the payment of money, or transfer of funds into Court.

It is of great importance in all countries, and more particularly in a country like *India*, that no officer of a Court of Justice should be even exposed to the suspicion, that in the discharge of his official duties his conduct may be influenced by any personal consideration ; and although we see no reason to think that the proceedings in the present case have been at all affected, either in their origin, or their conduct hitherto, by such considerations, yet when there is room for the operation of sinister motives, the belief of their operation can hardly be excluded from the minds of the parties.

For these reasons, our humble advice to her Majesty will be to reverse the first Order complained of, that of the 26th *September* 1843, and all further proceedings in the suit will of course be stayed. It does not appear necessary, therefore, to make any Order upon the second appeal.

CHOWDRY DEBY PERSAD and BENY } Appellants,
 PERSAD - - - - - }

AND

CHOWDRY DOWLUT SING - - - Respondent.*

On Appeal from the Sudder Dewanny Adawlut of Bengal.

*Deed—Consideration—Burden of proof of payment of—Recited in deed—
 If conclusive—Presumption from such recital—Rebuttal of—Circum-
 stances to be considered—Practice.*

The statement in a Deed of Compromise, that the consideration money was paid, is not of itself, according to the practice of the native courts in *India*, conclusive evidence of such payment, and may be rebutted by evidence of non-payment.

Where payment is denied and evidence of non-payment produced, the burthen of proof that the money was paid, lies on the debtor.

THE suit out of which this appeal arose, was instituted by the Respondent, to recover from the Appellants the sum of R. 30,501. 5 a. 4 k., the amount of principal and interest on a sum of S. R. 21,000, stipulated to be paid by the Appellants to the Respondent, in a *rufanama* (deed of compromise), bearing date the 24th of *June* 1835, entered into by the respective

11th & 13th
 Dec. 1844.

* Present: Members of the *Judicial Committee*,—Lord Langdale, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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parties to the original suit, under the following circumstances:—

In the year 1832, the Respondent instituted a suit, against the Appellants, and one *Domun Sing*, for recovery of a *mouza* called *Koolhana*, in *pergunna Ammartoo*, in the Presidency of *Bengal*. In that suit the decision was at first against the Respondent; but he appealed to the *Sudder Dewanny Adawlut* of *Calcutta*, and by a Judgment of that Court, bearing date the 28th of *July* 1834, obtained a Decree for possession. By an Order of the last-mentioned Court, dated the 7th of *November*, in the same year, the Respondent was ordered to be put in possession of the *mouza*, with a direction that the *wasilat*, or mesne profits, principal and interest, of the *mouza*, were to be accounted for, and paid to him, from the date of the suit to the date of possession.

In pursuance of this Order, the Respondent was put in possession, and an *Amin* deputed to take the account of the mesne profits of the *mouza*. No account, however, was taken, in consequence of an arrangement of compromise, having been entered into between the Respondent and the Appellants, and *Mussumat Jhuldi Kooner*, the widow of *Domun Sing*, whereby the Appellants and *Mussumat Jhuldi Kooner* undertook to pay the Respondent R. 30,000 for the mesne profits of *mouza* in question, from the commencement of the action, up to the date of possession, and R. 52,000 for mesne profits for the period antecedent to the institution of the suit. Of the above sums of R. 30,000 and 52,000, the Appellants were to pay one-half, as their share, which they engaged to discharge in the following manner:—Of R. 26,000, half of the R. 52,000, they undertook to

pay R. 21,000 in cash, and R. 5,000 by instalments ; and the whole of the 15,000, half of the R. 30,000, by instalments ; the instalments to commence from the beginning of 1243, and end in 1252, *Fusly*, corresponding with 8th *September* 1835, to *September* 1845, A.D.

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To effect this arrangement, a *kistbundy*, or instalment-bond, was executed by the Appellants, on the 24th of *June* 1835, and, at the same time, the Respondent executed a *rufanama*, acknowledging the compromise. In both of these instruments, the principal sum of R. 21,000 was mentioned to have been paid.

Some time in the year 1837, the present Appellants presented a petition to the *Zilla* Court, alleging that the Respondent received the R. 21,000, when the deeds were being drawn out, and that he had also received R. 5,600, under the instalment-bond. The Respondent, by a counter-petition, denied the truth of this statement, whereupon the Court, on the 11th of *January* 1837, ordered, that the *kistbundy* should be produced, and the subject of the *rufanama* and receipts be explained within fifteen days ; and the attendance of certain persons therein named was directed, to give evidence in verification of the facts stated in the proceedings.

In conformity with this Order, four persons, who alleged themselves to be subscribing witnesses to the deed of *rufanama*, the original writer of the instrument, and the *Kazi*, before whom the deed was executed, were examined by the Court. The actual payment of the sum in question was not, however, proved by any of these witnesses.

On the 31st of *March* 1837, the *Zilla* Court of

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Bahar made an Order in the cause, which, after giving the Appellants credit for R. 5,100, paid to the Respondent, on account of the R. 15,000, under the *kistbundy*-bond, ordered as follows:—"With regard to the R. 21,000, which is on account of profits for period antecedent to action of Appellant (the present Respondent), no Order can be passed from this Court; but if Appellant, as alleged by him, has not received the money in question, with regard to it, and with regard to the interest on it, he has the option of a regular suit."

The present Appellants were dissatisfied with this Order, and appealed to the *Sudder Dewanny Adawlut* of *Culcutta*, which Court, on the 29th of *June* 1837, ordered, so far as respects the subject-matter of this appeal, that "in the event of Appellant (the present Respondent) not having received the alleged R. 21,000 from Respondents (present Appellants), on account of profits for time anterior to action, with interest, Appellant was at liberty to enter into a regular suit for the same."

In pursuance of the leave thus given, the Respondent, on the 28th of *June* 1838, brought an action in the *Zilla* Court of *Bhagelpoor*, against the Appellants, for the recovery of the above sum of R. 21,000, for principal, and R. 7,595, for interest, making together the sum of R. 28,595.

By an Order of the *Zilla* Court of the same date, the cause was transferred for adjudication, to the Court of the Principal *Sudder Amin*, of the *Zilla Bhagelpoore*.

On the 19th of *February* 1839, the Appellants filed their answer to the above plaint, traversing the claim of the Plaintiff, and contending that the R. 21,000 had

been paid to the Plaintiff, upon the execution of the deeds of *kistbundy* and *rufanama*.

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Both parties entered into evidence before the *Sudder Amin*. On the part of the Plaintiff (the present Respondent) the proceedings in the *Zilla* Court of *Bahar* of the 31st of *March* 1837, and of the *Sudder* Court on appeal of the 29th of *June* 1837, before referred to, were produced, together with the *kistbundy* and *rufanama*, and the depositions of *Ghunsam Lal*, the writer of the deed of *rufanama*, and *Dhoorup Sing* and *Miter Sing*, two of the subscribing witnesses to the deed. The evidence of these witnesses proved that the R. 21,000 were not paid at the time of the deeds being prepared or executed; that at the time of the preparation of the deeds, it was intended that, upon payment of the R. 21,000, a formal receipt should be given; and that, at some months after the execution of the deeds, the money was spoken of, as being still due and unpaid.

The Defendants (the present Appellants), on their part, filed the depositions of the *Kazi*, before whom the *rufanama* had been executed, and of two of the witnesses to the *rufanama*; but no evidence was given to prove the fact of payment, nor was any receipt for the money produced; and it appeared that when R. 4,000 and R. 1,600, in respect of the instalments were paid, these sums were counted out in the presence of witnesses, and formal receipts taken.

On the 29th of *April* 1839, the Principal *Sudder Amin* made his decree, and thereby ordered, that the Defendants pay to the Plaintiff the sum of R. 30,501. 5 a. 4 k., the amount of claim, and R. 1,384. 12 a., costs—altogether R. 31,886. 1 a. 4 k.; and that Plaintiff should receive interest on the amount of claim,

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from the date of the decree up to the date of receipt, at the rate of one per cent., and costs.

Against this decision, the Defendants appealed to the *Sudder Dewanny Adawlut* of Bengal ; and, on the 30th of *July* 1839, filed their grounds of appeal, complaining of the decree, and contending that it was contrary to evidence.

The hearing of the appeal took place before C. *Tucker*, Esq., one of the Judges of the *Sudder* Court, on the 4th of *January* 1840, when judgment was delivered by him, in the following terms :—“ In my opinion, the judgment of the *Sudder Amin*, in the absence of proof to support the allegation of the Defendants, appears extremely just and proper, because the parties make no objection to the documents, only the Plaintiff denies the receipt of the money mentioned in them, and for the refutation of which denial, Defendants rest upon the bare circumstance, that Plaintiff had, in the documents in question, acknowledged the receipt of the money by him,—an argument scarcely beneficial to them in this case, as it is an understood thing that after documents are drawn out, money mentioned in them is paid, and, therefore, mention of the receipt of money is made in the document ; but the onus of proof as to the actual payment of the money mentioned in the documents, and its receipt by Plaintiff, must rest altogether with Defendants. The evidence, however, produced by them, does by no means establish a single iota of the fact, and although *Ahmud Ali*, *Kazi*, and *Hyder Ali*, and *Kishnee Rae*, have declared to the fact of the *Kazi*’s seal being impressed on the *rufanama* and *kistbundy*-deeds, on the acknowledgment by Respondent of the receipt of R. 21,000 by him, yet this circumstance does not prove

the actual receipt of the money, because Defendants, in their petition in *Zilla Bahar*, stated that the money had been paid at the time the documents were being drawn out ; and the evidence of the *Kazi* and other witnesses (in whose presence the documents in question were being drawn out at the *Kazi's* court) shows that the money had not been received in their presence ; and the statement of the Defendants (as found in their rejoinder), of the payment of the money by them in the village of *Sondhi*, while the drafts were being drawn out, is contradicted by their petition. The evidence of *Ghunsam Lal*, the transcriber of the draft and the fair copy of the documents, and of other witnesses, in regard to a promise being made, that the money would be paid after the deeds were drawn and executed, confute the Defendant's statement. Nor can the Plaintiff, who denies the receipt of the money, be required to prove a denial, because default of proof of payment on the part of Defendants in evidence sufficient for the establishment of Plaintiff's claim. In their defence throughout, in this case, the documents of Defendants go but indirectly and evasively to deny Plaintiff's allegation ; and in no instance is there a direct admission of actual payment of the money." It was, therefore, ordered that the appeal be dismissed, and the *Zilla* decision affirmed.

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The Appellants, after having filed a petition for a review of judgment, which was rejected, brought the present Appeal.

Mr. *Charles Buller*, Mr. *Jackson*, and Mr. *Forsyth*,
 for the Appellants ; and

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr.
Edmund F. Moore, for the Respondent.

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Mr. Baron PARKE:

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Their Lordships are of opinion, that in this case they ought to advise Her Majesty to affirm the Decree of the *Sudder* Court. There is no doubt that the deed of *rufanama*, which was executed between the parties, affords evidence, as to the only fact which we have to dispose of upon the present case, namely, whether the R. 21,000, which were stipulated as the sum to be paid down, upon executing the deeds of compromise, were paid or not. There is no doubt that the *rufanama*, which contains a statement of the fact, that the R. 21,000 were paid, is evidence. It is admitted on both sides, that it was not conclusive evidence, as the statement of such a fact in a deed under the seal would be in a Court of law in *England*; but it is evidence as far as it goes.

Then let us see whether that evidence, which is *prima facie* proof of the payment, is or is not rebutted by all the circumstances of the case.

We think, that looking at the mode in which this case has been treated by the Judge of the *Sudder Dewanny Adawlut* (who must be supposed to be well informed of the law and the practice in *India* in such cases); the statement of such a fact in a deed of this description, is *prima facie* evidence, that the money therein stated to be paid, was paid at the time of the execution of the deed. But he says "that it is an understood thing that after documents are drawn out, money mentioned in them is paid, and, therefore, mention of the receipt of money is made in the documents."

Now that being so, the inference that would be derived from the statement of such a fact in the deed is, that the *refunama* must *prima facie* be considered as evidence, that there was at the time that the deed

was executed, and as part of the same transaction, a payment of money. But that evidence is completely rebutted by all the parol evidence in the case, and by the admission of the parties, because all the witnesses present at the time of the transaction of the execution of the *rufanama*, either are silent as to the fact of the payment, or they expressly depose that no payment took place at the time.

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The Appellants themselves admit in the proceedings, that such was the fact, for they have stated in their answer to the plaint in the *Zilla* Court, that the money was received, without stating at what time—not stating that it was received at the time the deed was executed. In the rejoinder they make a different statement, and say that the money was paid antecedently to the execution of the deed, namely, while the draft of the deed was being prepared. In the petition to the *Sudder* Court, they state that the money was paid at the time that the deeds themselves were prepared. Thus varying in the statement of the time and place of the payment of the money, but not stating in any of them, that the money was paid at the time the deed was executed.

Therefore, the question now is this : the *prima facie* inference arising from the statement in the deed being rebutted, how stands the evidence with regard to the fact of the payment? The witnesses who depose to the execution of the *rufanama*, state that the Plaintiff upon that occasion admitted that he had received the money at an antecedent time. Now is that fact proved? If that fact had been proved, that the money had been paid at an antecedent time, not immediately at the time of the execution of the deed, but whilst the deed was being prepared, is it probable that such a sum as

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that would have passed from the one party to the other, without some receipt being given?

Then it is afterwards alleged by the Appellants, that the payment took place in the presence of respectable witnesses. Now those witnesses were not called in the *Zilla* Court, nor is any mention made of them in the Petition of Appeal ; but in the Petition of Review it is stated as a fact, that the Defendants had offered to bring forward those respectable witnesses before whom he said the payment took place, and that the Judge of the inferior Court, the *Amin*, had refused to receive them. Now it is impossible for their Lordships to believe that such could have been the case ; because it appears, that the proceedings before the *Amin* are conducted with regularity, according to the Regulations prescribed by the East India Company. Amongst these Regulations, it is ordered, that every document should be on the file of the Court, and if there had been any petition to examine those witnesses, there is no doubt that there would have appeared upon the files of the *Zilla* Court, some *durkhast* or petition, for the examination of those witnesses. Therefore, it is impossible, that their Lordships can believe that any such application had been made to the *Amin*. Then there is an admission by the Defendants, that there were those respectable witnesses who might have been brought forward ; and the circumstance of their not bringing them forward is exceedingly strong, that no such fact took place, as that there had been, antecedent to the *rufa-nama*, the payment of this sum of money.

Besides all this, it is insisted that there are some circumstances, from which it is to be inferred that this payment took place, because it is said, in the first place, that at the time when the instalments, stipulated

for in the Deed of Compromise, were paid, no mention was made of the fact of the large sum of R. 21,000 not having been paid. Now that is a fact, certainly, which at one time weighed with their Lordships, and which it appeared desirable to have explained; and explanation is given of the fact by the evidence of *Ghunsam Lal*. *Ghunsam Lal* is a person to whom both the Judge of the inferior Court and the Judge of the *Sudder Dewanny* Court give credit; both of them have stated that they acted upon his evidence, and, therefore, they must have formed an opinion that his evidence was worthy of belief. And they are much more competent to form an opinion than we are. This witness says, that at the time the payment was made, this conversation took place between the Appellants and the Respondent:—"What do you say now about the payment of the R. 21,000, in cash, mentioned in the document?" The Appellants, in answer, said, "It is difficult to pay at once R. 21,000. We shall arrange for it, and when the money is paid we shall take a receipt." Therefore, it is clear that at that time there was mention made of the non-payment of the large sum of R. 21,000. The *Kazi*, indeed, as the Appellants' counsel has observed, when he is interrogated as to the same conversation, says that none such took place. But in estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the latter may be explained, by supposing that his attention was not drawn to the conversation at the time.

Another circumstance which also had weight with their Lordships at one time, is the delay in the institution of the suit. That circumstance is no doubt

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deserving of consideration. It may have been that the Respondent was prevented from instituting the suit sooner, by delusive and evasive promises made from time to time. The mere circumstances of the delay in the suit, is a circumstance of some weight, but not of any great weight, when we look at the other facts of the case.

Their Lordships are of opinion, that the burden of proof, which lay upon the Appellants, of showing the payment of the money, has not been discharged. They have given some *prima facie* evidence of the payment, but that has been rebutted by the other evidence in the case, and by the consideration, that if it had been true, there were witnesses who could have placed the fact beyond dispute had they been called. It is not likely that the payment of so large a sum, which would require, according to the habits of the natives in *India*, a considerable time to effect, could have taken place, without some persons being present, who could have proved the facts. Upon the whole, their Lordships are of opinion, that the Judgment of the *Sudder* Court, and also the Judgment of the *Amin*, are perfectly right; and, therefore, that the Decree ought to be affirmed, with costs.

NAMBOORY SETAPATY and others - *Appellants*,
 AND
 KANOO-COLANOO PULLIA and others - *Respondents*.*

*On Appeal from the Sudder Dewanny Adawlut at
 Madras.*

Practice—Suit for declaration of right to have religious ceremonies performed by Brahmins—Caste rights and disputes—Jurisdiction of Courts to entertain—Madras Regulation XV of 1816, sec. x., cl. 3 and 4—Construction and scope.

Suit by certain *Comaties* of the *Vaisyas*, or third caste of the Hindoos, against the *Mantri-maha-nad* (secret assembly, for avenging encroachments upon rules or rights of caste), to establish their right to have performed for them and their tribe, certain religious ceremonies, called *soobha* and *asoobha* (auspicious and inauspicious), by *Brahmins*, in the language of the *Vedas*, in the enjoyment of which they had been disturbed by the *Brahmins* refusing to perform such ceremonies. In the answer to the plaint, the Defendants denied the right of the *Comaties*, and set forth certain acts, whereby they had forfeited their right to have the ceremonies performed for them, by the *Brahmins*. The *Zilla* Court, taking that part of the Defendants' answer which set forth the acts by which the forfeiture of the rights in question was occasioned, framed it into a statement of facts and law, for the opinion of the *Pundit* of the Court; and upon his opinion, declared the Plaintiffs' tribe entitled to have the ceremonies performed for them by *Brahmins*. Upon Appeal, the Provincial Court remitted the suit to the *Zilla* Court, to take evidence, and upon such evidence, and the opinions of the *Pundits*, which the Provincial Court took upon the same statement as the *Zilla*, they affirmed the Decree. The *Sudder Dewanny Adawlut*, upon the whole case, reversed these decisions. Held by the Judicial Committee of the Privy Council, reversing the decisions of the three Courts, that the whole proceedings were irregular, and contrary to the express provisions of the *Madras* Regulation XV. of 1816, sec. x., cl. 3 & 4, which required the Judge to record the points necessary to be established, before the evidence could be taken; the opinion of the *Pundits* being also taken upon an assumed statement of facts, not admitted or recorded. But in consideration of the circumstances, such reversal was without prejudice to bringing a fresh suit.

Quære. Whether the Civil Courts in *India* have any jurisdiction to entertain a suit, not involving any civil rights, as a matter of law, and make a declaration of the right, to perform or have performed, any religious ceremonies.

THE question involved in this Appeal respected the rights of the castes of the *Brahmins* and *Vaisyas*, and

7th & 8th
 Feb. 1845.

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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arose out of a claim preferred by the Appellants, as the representatives of the *Comaties*, a tribe of merchants and traders residing at *Masulipatam*, in the Presidency of *Madras*, to have the whole of certain religious rights and ceremonies, called *soobha* and *asoobha* (auspicious and inauspicious), performed for themselves and their families, in their houses, by *Brahmins*, in the language of the sacred writings, the *Sastras*, and the *Vedas*.

The Respondents (who were members of the *Mantri-maha-nad*, or secret assembly for avenging encroachments on the rites and rules of caste) asserted that the *Comaties*, and the whole Merchant class, having for many ages neglected to observe some of the ceremonies prescribed for their caste, and in their stead adopted other and spurious ceremonies, in conformity with rites prescribed in the *Puranas* (a) and others works, had become degenerate, and had so absolutely forfeited the privilege they once possessed, that no expiation could restore them to their former rights.

Disputes having for a long time existed between the *Brahmins* and the *Comaties*, concerning the performance of these ceremonies, and disturbances constantly taking place on their performance, or the attempt to perform them, the magistrate of the city of *Masulipatam*, in order to bring the question at issue before a tribunal competent to determine the right, issued an Order, prohibiting the *Comaties* from the performance of one of the ceremonies in question, in the language of, or according to, the *Vedas*, until they had established their right to do so in a Civil Court.

In consequence of this Order, the Appellants, *Ma-*

(a) The sacred heroic poems of the *Hindoos*, considered next in authority to the *Vedas*.

medy Linghia, Chittoory Veria, and Namboory Vencata Das, who were the leading men of the Merchant caste, filed a plaint in the *Zilla Court of Masulipatam*, against *Kanoo-Colanoo Ramia, Kanoo-Colanoo Nagana*, and *Caza Condavathoriloo*, the Respondents, as members of the *Mantri-maha-nad*.

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The plaint stated, that on the 20th of *June* 1817, impediment was made against the Plaintiffs attending to the rites prescribed by the *Vedas*; and they sued for Rs. 600, viz. Rs. 200 as loss and 400 as damages, and prayed for permission to perform, in conformity to the *Vedas* and the *Sastras*, the rites and ceremonies of their caste, viz. *upanayana* (or investiture of the sacerdotal thread), marriage, and other *soobha* and *asoobha* ceremonies, and expressly stated that they (the Plaintiffs) all agreed to conform to the special rules laid down in the *Hindoo Dharma Sastras*, which had been approved of and acted on by the Government.

The Defendants, by their answer, denied the right of the *Comaties* to perform, and the fact of their ever having performed, the ceremonies appointed by the *Vedas*; they admitted the intervention of the magistrate, and stated that “upwards of two thousand years ago, the *Comaties* (Merchant caste) adopted the customs of the *Soodra* caste, and some of them became ‘*Byri Comaties*,’ and ‘*Bookka*,’ caste people, &c.; the rest of them, amounting to one hundred and two ‘*gotrums*’ (families or tribes), fabricated false *gotrums* for themselves, and called themselves *Nagaram Comaties*. They fabricated a book called ‘*Canniaca Puranam*,’ named the *Bhascara Puntooloo-varoo* their priest, conformed to that book, performed the sign of the *upanayana* ceremony in a loose manner, and in the language of the *Puranas*; at the time of marriage,

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made marriage ceremony in seven days, contrary to the custom of all castes whatever, erected '*prolu*' posts, made (*nepasani moodaloo*) lumps of dough with flour, and got the same divided among them according to their spurious '*gotrums*,' at midnight fetched the pot of water called '*arivany*,' and observed the ceremonies for ten days on the occurrence of a birth, and fifteen days on the occurrence of a death. In this manner the forefathers of the Plaintiffs, the other merchants, and the Plaintiffs themselves, had got all ceremonies conducted for upwards of two thousand years past." They stated instances in which the Plaintiffs, or some of them, had failed in previous attempts to sustain the right now claimed, and objected to the form of the plaint as not sufficiently setting forth the particulars and nature of the obstruction, for which the Plaintiffs sought for compensation, in accordance with section iii., Reg. III. of 1802.

The Plaintiffs filed their reply, in which they insisted generally on their right to the performance of the ceremonies in question, but without negating or rebutting the specific statements contained in the answer. To this the Defendants rejoined.

Before the filing of the replication, the following question was propounded to the *Pundit* of the *Zilla* Court:—

“Would it be lawful for the *Brahmins* to administer all the rites, consisting of the *soobha* and *asoobha* ceremonies to the third caste, viz. *Vaisyas*, in the language of *Vedas*, as prescribed by the *Dharma Sastras*?”

The *Pundit*'s answer to this question was as follows:—“As the *soobha* and *asoobha* ceremonies for the third caste, viz. *Vaisyas*, are conformably to the

Dharma Sastras laid down in the *Vedas* and *Smritis*,
Brahmins may regularly administer them all.”

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The points at issue not being clearly ascertained from the pleadings, the parties were questioned in open Court, in conformity with cl. 2, s. x., of Reg. XV., 1816, as to the precise object of the action, and the grounds on which it was maintained; when the Plaintiffs stated, that their object was, the establishment of their right to have the whole of the *soobha* and *asoobha* rites and ceremonies performed in their houses by *Brahmins*, in the language of the *Vedas*, and that they claimed this right on the ground of the *Sastras*.

Whereupon the *Zilla* Judge submitted the following case and questions to the Hindoo law-officer of the Court:—

“A dispute arose in a certain city between the men of the *Brahmin* caste, and those of the Merchant caste. The Merchant caste claimed the right of having the *soobha* and *asoobha* ceremonies performed for themselves and families, in the language of the *Vedas*. The *Brahmins* admitted that the Merchant caste originally held the right in question, but contended, that they had forfeited it, for the reasons stated in the paragraph of their answer to the complaint of the Merchant caste” (already stated (a),); and required his opinion on the following points:—

“First. Whether any, and if any, which, of the above acts of commission were expressly forbidden by the *Vedas*?

“Second. Supposing any of the above acts to be expressly forbidden by the *Vedas*, and supposing a man of the present generation had committed that act, does it necessarily follow, according to the *Vedas*, that

(a) *Ante*, 361.

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the young son of that man forfeited his right to have the *upanayana* ceremony performed, in the language of the *Vedas*, at the proper age?

“Third. In the same double supposition, does the man himself forfeit his right to have the *soobha* and *asoobha* rites and ceremonies performed for him, in the language of the *Vedas*?

“Fourth. Supposing any of the above acts to be forbidden by the *Vedas*, and that the man who commits it, as well as his son, thereby forfeited their right to have the *soobha* and *asoobha* ceremonies performed for them, in the language of the *Vedas*, does it follow, according to the *Vedas*, that that man and his son have totally forfeited their right, and never can redeem it by any kind of penance or expiation?

“Fifth. If the right be redeemable, what is the requisite penance or expiation?

“Sixth. Supposing the family of a man of the Merchant caste has not, for several generations past, had the *soobha* and *asoobha* ceremonies performed in the language of the *Vedas*, have that family, according to the *Vedas*, forfeited the right altogether, or would it be lawful for a *Brahmin* to perform such ceremonies in the language of the *Vedas* for that family, upon the father of it, in the present generation, doing the requisite penance or making the requisite expiation?”

The *Pundit* returned the following answer to these questions:—

“From the matter contained in these paragraphs, the query of the Court appears to be, whether any act is expressly forbidden by the *Vedas*.

“Nothing herein contained is expressly prohibited by the *Vedas* and *Sastras*. The question of the Court

implies that the Merchant caste, i.e. *Vaisya*, who subsist by trade, have for upwards of two thousand years not performed the *upanayana* ceremony as prescribed by the *Vedas*, and that only the sign was performed.

“From this I am led to think, that without performing the several rites prescribed by the *Vedas*, the *upanayana* ceremony alone was performed.

“No penance is prescribed by the *Sastras* for persons who have been performing *upanayana*, from generation to generation, except in the case of persons having the right to *upanayana* and other ceremonies, who have for a considerable time ceased the observance of them. If a young man of the present generation, or any other person, should state that he is completely degenerated, by the non-performance of the *upanayana* and other ceremonies, and express a desire to be regularly purified, the expiation shall be appointed by not less than three *Brahmins*; a greater number is not forbidden by the *Sastras*, consequently *Brahmins* may appoint such expiation as they shall deem fit. *Upanayana* and other ceremonies are expressly prescribed by the *Dharma Sastras* to be performed in the language of the *Vedas*. I am, therefore, of opinion that *Brahmins* may lawfully perform them.

“The Court have put the query to know what is the expiation. I have not stated it now, as it is impossible to know what may be appointed according to the best judgment of pious *Brahmins*.”

The Court being dissatisfied with this answer, referred the case to the *Pundit* for re-consideration, who returned the following further answers:—

To the first question he answered, “Not one of the above acts is forbidden by the *Vedas*.”

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Second. "Those acts not being expressly prohibited by the *Vedas*, it follows that no ancient right can be forfeited by the performance of them."

Third. "The man himself does not forfeit any right, and for the reasons stated in the foregoing answer."

Fourth. "I am of opinion that even if a man's family, from generation to generation, have committed acts forbidden by the *Vedas*, yet may he have the ceremonies performed regularly, through the means of the expiation prescribed by the *Dharma Sastra*."

Fifth. "If a right be utterly forfeited, as in the case of a family having for generations been joined to another caste, there is no expiation. With respect to the Merchant caste people in this instance, it appears from the above case that they have the right of *upanayana* and other ceremonies; and, therefore, it does not appear that any expiation is required by the *Dharma Sastra*."

Sixth. "The *soobha* and *asoobha* ceremonies, consisting of *garbha-dhana*, and *upanayana*, &c., is prescribed by the *Vedas* and *Sastras*, and, therefore, the *Brahmins* may perform the *upanayana* and other ceremonies regularly in the language of the *Vedas* for the Merchant caste."

On the subsequent day, the *Pundit* presented the following additional answer to the sixth question propounded by the *Zilla Judge*:—

"In the queries put by the Court regarding the dispute between the men of the *Brahmin* caste and those of the Merchant caste, my answer then given to the sixth question was too brief; I, therefore, now write explicitly.

“Even if a family of the Merchant caste had for many generations ceased to observe the *soobha* and *asoobha* ceremonies, prescribed by the *Vedas*, the members of that family (in the present generation) would not have utterly forfeited their right to resume the observance of those ceremonies.

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“If a member of that family in the present generation should be desirous of resuming his ancient rights, it is laid down in the law, that upon his being purified by a *Brahmin*, the *soobha* and *asoobha* ceremonies, prescribed by the *Vedas*, may be performed for him.

“It appears from the above case, that the Merchant caste have been performing *upanayana* from generation to generation; and, therefore, I am of opinion that, according to the *Vedas* and *Sastras*, *Brahmins* may lawfully perform the *soobha* and *asoobha* ceremonies for the Merchant caste without purification being at all necessary.”

Evidence was tendered on both sides, but the Court was of opinion, that it was unnecessary, as “no distinct act of injury having been alleged to have been committed by the Defendants, the Plaintiffs could not be permitted to produce evidence that they had sustained injury; and with respect to the facts alleged by the Defendants, it has so happened that every object has been attained at once by assuming them to be proved.”

On the 27th of *June* 1818, the Court pronounced its Decree, whereby it was declared, that the people of the *Comaties* caste might lawfully have the *soobha* and *asoobha* ceremonies performed in their houses, and in the language of the *Vedas*, by *Brahmins*, and that whosoever should hereafter interrupt, or attempt to

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interrupt, the performance of any of those ceremonies, in the manner aforesaid, would be liable to be proceeded against, for resisting a Decree of Court; and he directed each party to bear their own costs.

From this Decree, the Defendants appealed to the Provincial Court for the Northern Division of *Madras*, complaining that the *Zilla* Judge had passed it against them, without examination of the evidence tendered to prove the customs practised by the *Comaties*, and also alleging, that as the opinion of the Hindoo law-officer was only partly in favour of the *Comaties*, the *Zilla* Judge should, conformably to cl. 1, sec. xvi., Reg. III., 1802, have referred it for confirmation, to the Hindoo law-officers of the higher Courts; and they prayed, therefore, that the Court would, agreeably to sec. xviii., Reg. IV. of 1802, permit them to file their documents, and hear their witnesses, and to reverse the Decree.

Pending the appeal, *Kanoo-Colanoo Nagama*, one of the original Defendants, died, leaving the Respondent, *Kanoo-Colanoo Chandrapa*, his son and heir, a minor, who was admitted to prosecute the appeal; and about the same time, the Defendants, *Caza Condavathoriloo Yazooloo* and *Kanoo-Colanoo Ramia*, died, leaving *Caza Nagheswara Somayazooloo* and *Kanoo-Colanoo Pullia*, their respective heirs, surviving, who were also admitted to prosecute the appeal.

On the 27th of *May*, the Provincial Court ordered the record to be returned to the *Zilla* Judge of *Masulipatam*, with precept, requiring him to receive the documents, and examine the witnesses, and re-transmit the record, with the evidence so taken, to the Provincial Court.

In pursuance of the above Order, Mr. *H. Vibart*,

who was then the Judge of the *Zilla* Court, proceeded to take the documentary and oral evidence, tendered on the part of the Plaintiffs and Defendants. For the Plaintiffs, certain documents were tendered, purporting to come from the chief priest, and from an assembly of learned men, to one *Raya Naikooloo*, and from an assembly of learned men at *Guntoor* to a like assembly at *Masulipatam*, and a mandate from the chief priest to one *Mamedy Venkia* ; setting forth and alleging the right of the *Vaisya*, or third class, to the performance of the *upanayana* according to the *Vedas*, and commanding the performance of that ceremony in accordance with the *Vedas*. They also produced twelve witnesses: one a *Purohita* or family priest, and a person employed in the priestly office, a *Pundit*, a shopkeeper, a servant, an *agrahamdar*, (or inhabitant of a village held in proprietary right by a *Brahmin*,) and six persons professing the trade of begging, and obtaining their subsistence from *maniams* (honorary gifts) or alms. These witnesses were called chiefly to prove the right of the Plaintiff's *gotrum*, or tribe, to exercise the privileges of the *Vaisya* class, and to perform and to have performed the *upanayana* and the *soobha* and *asoobha* ceremonies.

The Defendants produced documentary proofs, consisting of the proceedings of their caste, concerning the improper performances of the ceremonies by the Plaintiff's *gotrum*, and the means taken to prevent their profanation. They also produced various letters to prove that the mode of address adopted by the Plaintiffs was inconsistent with their being on an equality with the people of the Defendants' caste : and they examined twenty-four witnesses, including priests, *Pundits*, *Gomashtas*, heads of the assembly

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and of the Defendants' caste, tradesmen, mechanics, and persons obtaining their subsistence from *maniams*; all of whom deposed to the nature of the customs observed by the Plaintiffs, at their marriages, being in accordance with those described by the Defendants in their answer; that the Plaintiffs were of a *gotrum* or tribe distinct from the Defendants, having degenerated from their caste, and that they were not entitled to perform, nor were they in the habit of performing, the ceremony of *upanayana*, or the *soobha* and *asoobha* ceremonies in the language of, or according to, the *Vedas* and *Sastras*.

The evidence thus taken was transmitted by the *Zilla* Court to the Provincial Court of the Northern Division, and, having been read, a motion was made on the part of the Defendants, to refer the questions at issue for the opinion of the *Pundit* of the Provincial Courts.

On the 24th of *August* 1827, the First Judge of the Provincial Court for the Northern Division delivered in the following draft minute of Decree:—The object of litigation in this cause being of considerable importance, as involving the rights of caste of the *Brahmins* and *Banians*, I am of opinion that it will be of advantage, that the Provincial Court, previously to coming to a decision upon the merits of the cause, should have before them the correctest information as to the bearings of the Hindoo law upon the question at issue, and for that purpose, that the motion of the Appellants, praying that the questions proposed for the opinion of the *Pundit* of the *Zilla* Court, in this cause, should be submitted to the *Pundits* of the several Provincial Courts, should be complied with.

The Third Judge was precluded from giving an opi-

nion in the Provincial Court, inasmuch as the original Decree had been passed by him when *Zilla* Judge, and there being a difference of opinion between the First and Additional Judge on the subject of proposing the questions to the *Pundits* of the several Provincial Courts, it was ordered, agreeably to sec. ii., Regulation XV. of 1802, that the opinion of the First Judge be admitted, and the questions be transmitted to the Registrars of the several Provincial Courts.

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To the questions so transmitted, the following answers were obtained from the *Pundits* of the four Provincial Courts:—

First Question. “Can the *Brahmins* properly perform all the *soobha* and *asoobha* ceremonies for the third or *Vaisya* caste with the *Veda mantras*, according to the *Dharma Sastra*?”

First Answer. “As it is authorised in the *Dharma Sastra* that all the *soobha* and *asoobha* ceremonies may be performed for the third or the *Vaisya* caste, according to the *Veda*, the *Brahmins* may perform the ceremonies according to the *Veda* for the *Vaisyas*, who have had no interruption in the performance of the ceremonies of the *Vedas*.”

(The further statement of the nature of the dispute, and the queries submitted to the *Pundits* of the Provincial Courts were the same as those already put to the *Pundit* of the *Zilla* Court (a).)

Vankamamedy Narraina Sastrooloo, the Northern Provincial Court's *Pundit*, returned the following answer:—

First. “The ceremonies mentioned in the case, viz., *prolustumbaloo*, or posts, *napasani moodaloo*, or lumps

(a) *Ante*, 363.

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of dough, *arivany*, or sacred water, &c., not being pre-
 scribed by the *Vedas* to be performed on the occasion
 of marriage, the said ceremonies are not consistent
 with the *Vedas*.”

Second and Third. “The man of the present gene-
 ration having, by performing the marriage and *upana-
 yana* with the observance of the foregoing ceremonies,
 which are contrary to the *Vedas*, forfeited his right,
 his young son can have no right to perform the
upanayana newly according to the rule contained in the
Vedas.”

Fourth. “If a man whose ancestors had from the
 beginning observed the ceremonies of *upanayana*, &c.,
 prescribed by the *Veda*, had not had the ceremony of
upanayana performed for himself at the proper age, and
 wished to perform it at a subsequent period, he should
 perform the penance called the *vrata stomum*, and per-
 form the *upanayana* according to the *Veda*: thus it is
 stated in the work by *Vignyaneswara*:—

“The *Dharma Punnaloo* prescribes penance for a
 man whose grandfather and father did not perform the
upanayana, but penance is not granted to those whose
 ancestors beyond the grandfather, did not perform the
soobha and *asoobha* ceremonies ; but as the present man,
 who has not had the ceremonies prescribed by the
Veda from the time of his ancestors, and his son,
 relinquishing the *rishi gotrams* (a), follow the invented
gotrams, and perform the ceremonies prescribed for the
 observance of the *Vuneda* caste people, according to
 the *Canniaca Puranam*, they are not entitled to any of
 the two descriptions of penance mentioned above, and
 consequently have totally lost the right of performing

(a) A *gotrum* or family which bears the name of *Rishi* (a saint or
 holy personage), from whom the descents is traced.

the ceremonies in the language of the *Vedas*, and they cannot redeem it by any kind of penance.

“*Yagnyawalkya* in *Vignyaneswara*. The *Brahmins* ought to perform the ceremony of *upanayana* within the age of sixteen years, the *Cshatriyas* within the age of twenty-two years, and the *Vaisyas* within twenty-four years ; should they exceed the above period respectively, he forfeits the *Brahminical* thread, and the right to perform the ceremonies in the language of the *Vedas* ; if he performs the penance called the *vratea stomum*, he will obtain the right of performing the ceremony. *Dharma Prashna* says, that the man whose father and grandfather have not the *upanayana*, is equal to the murderer of a *Brahmin*, and forfeits the right to the ceremonies, but is entitled to penance if he wishes it.”

Fifth. “Persons who have not had the *upanayana* since many generations, according to the *Veda*, have not any kinds of penance, for the reasons stated in the fourth answer.”

Sixth. “As the descendants of the *Vanedor* caste have not performed the *Veda* ceremonies since many generations, they have totally lost the right of performing the *soobha* and *asoobha* ceremonies in the language of the *Vedas* ; and from the fourth answer it may be understood that the man of the present generation belonging to that family has no penance, and it is not consistent with the law that the *Brahmin* should perform the ceremonies for such a man.”

The *Pundit* of the Provincial Court for the Centre Division of *Madras*, having had the same questions referred to him, returned the following answer:—

“The *Brahmins* ought not to perform the ceremonies in the language of the *Veda* for the *Vaisyas*.”

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To which he subsequently added a further answer, and stated that in his opinion the Judges ought to pass a decision, awarding that the *Comaties* are to continue to perform their religious rites according to the rules laid down in the book called *Puranam*, as are at present observed by the corrupt or degenerate *Vaisyas* or *Comaties* and others.

The *Pundits* of the Provincial Court for the Southern and Western Division of *Madras* returned answers to the same effect.

On the 28th of *June* 1828, the Provincial Court, consisting of the Second and the Additional Judge (the First Judge being dissentient), passed a Decree, affirming the Judgment of the *Zilla* Court, but without costs.

The present Respondents filed a special petition of appeal to the *Sudder Dewanny Adawlut* of *Madras*, which the Court, pursuant to Regulation XV., 1816, sect. iv., cl. 4, allowed.

The Appellants neglected to put in any answer to the Respondents' special grounds of appeal, in the *Sudder Dewanny Adawlut*, whereupon that Court ultimately ordered, that the appeal should be heard *ex parte*, and on the 25th of *March* 1833 the *Sudder Dewanny Adawlut* pronounced the following Decree:—
 “The case of the original Plaintiffs lies in a narrow compass; they claimed the privilege of performing certain religious ceremonies which, they averred, were authorised by the *Vedas*. Their right to perform them is defended by the *Zilla Pundit* alone.

“The Court of *Sudder Adawlut* having maturely weighed the evidence produced, and considered the unbiassed and concurring opinions of the four law-officers of the Provincial Courts, entertain no doubt

as to the correctness of their exposition of the Hindoo law.

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“The Court of *Sudder Adawlut*, therefore, determine to reverse the Decree of the Provincial Court of Appeal in the Northern Division, and the Decree passed by that Court is hereby reversed accordingly:” the Plaintiffs to pay all costs in the three Courts.

From this Decree the present Appeal was brought.

Mr. *Wigram*, Q.C., Mr. *Jackson*, and Mr. *Forsyth*,
for the Appellants.

This case is of considerable importance, affecting the rights of a very numerous class in *India*, to exercise what they conscientiously consider to be a very grave religious duty—that of performing, or having performed for them, religious ceremonies in the language of the *Vedas*. According to the constitution of the Hindoo society in *India*, as prescribed by *Menu*, (Inst. of *Menu*, p. 6, *plac.* 31, p. 15, *plac.* 91. 1 *Elphinstone's India*, 23,) they are divided into four chief classes or castes; first the *Brahmins*, of which division are the priesthood; second, the *Cshatriya*, or military class; third, the *Vaisya*, or trading class; and the *Soodra*, or servile class. The first three classes are declared to be *dwijatvam* (twice born), and entitled to have the *soobha* and *asoobha* ceremonies performed by the *Brahmins* on their behalf, in the language of the *Vedas*. The *Soodras* are not entitled to this privilege. These religious ceremonies are laid down, and their great importance explained in the Institutes of *Menu*. (2 Chap. pl. 38 & 39. 1 *Elphinstone's India*, 71, 77.) The Appellants are *Comaties*, a subdivision of the *Vaisya* class, and are bound, to preserve caste, to perform these ceremonies in the language of the *Vedas*, having, of course, a *Brah-*

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min to assist them ; and the simple question is, have the *Brahmins* a right to interrupt them in the performance of their religious exercises? No party in *India* has a right to interrupt another in the performance of a mere religious duty. (2 *Strange's Hindoo Law*, pp. 261, 2, 3, 5.) It is said by the *Brahmins*, and insisted by the answer of the Defendants, that the third caste have ceased to exist in this *Cali yug*, or Iron age ; and, moreover, if they did exist, the *Comaties* have forfeited all right to the exercise of these ceremonies, by the adoption of impure customs. Neither of these objections can be sustained. The *Vaisya* caste still exist. Their rights are recognised and provided for by all the authorities in force in *India*. (The *Mitacshara* by *Colebrooke*, p. 291 ; the *Daya-bhaga* by *Colebrooke*, p. 145 ; the *Dattaka Chandrika*, 55.) There was satisfactory *prima facie* evidence in the suit to prove that the *Comaties* of the present day are, by reputation, of the *Vaisya* caste, and they are so recognised by recent writers on *India*. (*Buchanan* on the *Mysore*, p. 259 ; *Steele* on the Laws and Customs of the Castes at *Bombay*, p. 96 ; Professor *Wilson's* Catalogue of *Mackenzie's* Collection of MSS., vol. 2, pp. 109, 117, 133.) A loose performance of the religious ceremonies does not deprive a man of the privileges of his caste. (Professor *Wilson's* Lectures at *Oxford* in 1840, p. 8.)—[Lord *Brougham*: The Hindoo law is so highly ceremonial, that it may be considered, that the performance of it in a loose manner is no performance at all.]—In the present case we do not seek to compel the *Brahmins* to perform these ceremonies. It does not affect any question of civil right. All we seek for, is a declaration of the Court, that the *Brahmins* were not to interrupt us. The Courts exceeded

their jurisdiction in deciding that we had no right. If the *Brahmins* choose to exclude one of their fellows for having forfeited caste, and were to exclude him from commensality and the enjoyment of ordinary civil rights, a Court of Justice might have jurisdiction to entertain the question whether they were justified in depriving him of a civil right. *Nhanee v. Hureeram Dhoolubh* (a) ; but this case is merely a question of religion, introducing no infraction of civil right. The Court should have simply declared that we were to be protected from interruption in our performance of the ceremonies.—[Lord *Brougham*: In the nature of what is called in *Scotland* a declaratory action.]

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The Decree of the *Sudder* Court cannot be maintained. It proceeded wholly on the opinions of the law-officers of the Provincial Courts, which were given upon a statement of the case extracted by the *Zilla* Court from the Respondents' answer, and is not binding on the Appellants. By clause 3, sec. x., of the *Madras* Regulation XV. of 1816, it is enacted, that "the Court shall consider and record the point or points to be established, respectively, by the Plaintiff or Appellant, and by the Defendant or Respondent, and shall proceed to take the evidence which may be adduced by either party upon such points, in the manner prescribed by the rules in force." And, by the 4th clause, it is further enacted that, "in like manner, if proof shall be required on any other points in the course of the trial, such points shall be recorded on the proceedings, and the proper party shall be called upon for the requisite evidence." This Regulation has not been observed by the

(a) 1 Borr. Bom. Sud. Rep. 84.

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Courts. The point at issue was not clearly ascertained by the pleadings, nor did the Court record any point to be established: it is, therefore, a fatal objection to the competency of the suit. *Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver v. Rany Anga Moottoo Natchiar* (a). The Provincial Court sent the case back to the *Zilla* Court to take evidence, but did not, as required by the Regulation, define the points. The *Sudder* Court acted upon the opinions of the *Pundits*, and the opinion of the *Pundits* was formed upon a state of facts derived from the information of the opposing party. The Court had no right to use evidence, unless it was evidence given upon an issue formally propounded. What the Court ought to have done was—First, to have followed the Regulation; not to have looked at any evidence independent of it. Secondly, when they had got the evidence, they should have framed a case for the opinion of the *Pundits*.—[The Right Hon. Dr. *Lushington* : The mistake is, that the Judges make the first a question of law and not of fact—whether the Defendants were originally entitled; the next question is, whether such a right could be forfeited; and the third, by what circumstances, and then bringing in the facts. Instead of that, you have a state of facts which is neither admitted or proved.]—Nothing can justify a departure from the Regulation. The whole proceedings are irregular.

Mr. *Burge*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

By the *Madras* Regulation III. of 1802, sec. xvi., cl. 1, jurisdiction is given to the Courts in *India*, and

(a) *Ante*, 278.

consequently the Appellate Court here, to entertain suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions. This disposes of the Appellants' objection to the competency of the Court below to entertain the suit; but even if that objection were tenable, it should have been taken in the Court below. The Appellants cannot withdraw from the Appellate Court, the cognizance of the very question, which they submitted to the subordinate Court.—[The Right Hon. *T. Pemberton Leigh*: Have the Courts in *India* the power to decide a right merely in the abstract?] In *Sri Sunkur Bharti Swami v. Sidha Lingayah Charanti* (a), damages were laid and assigned. No opinion was expressed by your Lordships upon that point. It was remitted to *India*, with a preliminary declaration for the Court to determine, in the first place, whether an action would lie by a grantee against a person not possessing a grant, assuming to be carried crosswise in a palanquin.

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The next objection is, that the evidence was improperly taken. By sec. xviii., of Regulation IV., 1802, it is left to the discretion of the Court to supply with evidence anything which might be wanting.—[Lord *Brougham*: Regulation XV. of 1816, sec. x., cl. 3 and 4, is peremptory, that the Courts shall not consider any evidence, till they have the points properly raised]—Neither can the objection, that the *Pundit's* opinions were improperly received, as being formed upon an assumed state of facts, be sustained. We have established by evidence, deviations, on the part of the Appellant's tribe, from the religious ceremonies prescribed by the *Vedas*, and the opinions were, that the effect of those deviations was to deprive them of the

(a) *Ante*, 198.

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right they claim. Upon the merits, it is clear from the evidence adduced, that the *upanayana* has not been duly performed, by or for the *Comaties*, for many generations, and that the religious ceremonies used by the *Comaties* of the Appellants' tribe were so performed, as to render them impure and of no efficacy. That being so, according to the Hindoo law, as correctly expounded by the *Pundits*, the Appellants' tribe are not entitled to the privileges of the *Vaisyas*, claimed by their plaint, and ought not to be permitted to exercise the ceremonies therein specified.

Lord BROUGHAM:

Before stating what the Judgment of their Lordships is, it is necessary that I should, upon two points, guard it from the possibility of misconstruction. One of those points is exceedingly important in this case, and with a view to the merits of cases of this description. The other is of equal importance in a more general view, with reference to other proceedings and other cases at large.

In the first place, their Lordships wish to guard very carefully against its being supposed, that in what they are about to do, namely, to reverse all the previous decisions, that is, of the *Zilla* Court, the Provincial Court, and the *Sudder Dewanny* Court, they give any opinion whatever upon the question, whether those Courts had a right to proceed, or had jurisdiction to proceed, to the determination of the question, as a matter of law merely. Whatever the inclination of their Lordships' opinion may be, that not having been the subject of argument, of discussion, or of decision below, they do not consider that upon that point they

are entitled, or that they are called upon, to give any judgment, and they gladly withdraw from it.

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The other point is with respect to the operation of that most beneficial Regulation, XV. of 1816, sec. x., c. 3, to which I would add clause four, for that is even stronger and clearer than the third, showing distinctly that it is not directory, but mandatory and imperative. Holding the Regulation, generally speaking, but especially that part of it, with which we are more particularly dealing here, to be a most wholesome and beneficial Regulation, requiring to be most zealously guarded and most carefully kept in view, and if possible extended, as I hope it may be, to the other Presidencies (*a*), (but that is my own private opinion merely,) it would be highly inexpedient that any doubt should exist of the determination of their Lordships on all occasions henceforth, as on all occasions hitherto, (and I allude particularly to a Judgment which was pronounced last *June* (*b*), by my right honourable colleague, Dr. *Lushington*,) to abide by and support that Regulation. Nothing, therefore, to be done to-day, is to be taken, as in any way impeaching, or as doing otherwise than showing forth and testifying the high respect for that Regulation, which their Lordships continue to feel.

Having made these preliminary observations, I have only further to state the opinion of their Lordships, in which we all agree, and in which we have the concurrence of the able and learned persons who are the assessors of their Lordships in these Indian cases, that their Lordships think fit to determine that the

(*a*) This Regulation applies to *Madras* only.

(*b*) *Srimut Moottoo Vijaya Raghanadha Gowery Perria Woodia Taver v. Rany Anga Moottoo Natchiar. Ante, p. 278.*

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Plaintiffs not having, in their opinion, alleged any case of injury done to them by the Defendants, upon which they were entitled to go into evidence, and not having, therefore, established any case for damages in their suit against the Defendants, no question remained but of a mere declaration of a right to perform certain religious ceremonies; that if the Courts below had jurisdiction to proceed to the determination of that question in this suit (upon which their Lordships guard themselves in their Judgment, as well as in the prefatory observations which I have made, against giving any opinion), the Plaintiffs have not produced sufficient evidence to establish such a right; that, under these circumstances, all the Decrees, therefore, ought to be reversed, and the plaint dismissed (the reversal by the *Sudder* Court amounts, in fact, to a dismissal of the plaint); but it is not, as it ought to be, a dismissal without costs; and that this decision should be without prejudice to the existence or the non-existence of the right claimed by the Appellants, in any other suit, in which such a question may be properly raised.

It is fit that I should add, in order to prevent all mistakes, and all applications to us, henceforth, on the subject, that the result of the decision of their Lordships clearly is, that all the costs of each party must be borne by that party, both in the *Zilla* and Provincial Courts, and the *Sudder* Court, and here. We do not deny that there is a right to give costs in the way in which the *Sudder* Court gave them; but we do not think that this was a case for it. There is also, no doubt, a right here to give costs to the party supposing the Decree; but it is very rarely done.

THE MOKUDDIMS of KUNKUNWADY - Appellants,

AND

THE ENAMDAR BRAHMINs of SOORPAL - Respondents.*

On Appeal from the Sudder Dewanny Court at Bombay.

Practice—Appeal to Privy Council—Irregularity not affecting merits—If justifies interference in—Arbitration—Award by punchayet—Validity of—Conditions—Boundary dispute—Riparian rights—Jurisdiction of Collector.

An award made by a *Punchayet*, settling a disputed boundary to land forming an Island, claimed by the inhabitants on the respective banks of the river, under circumstances, set aside, as having been made contrary to the provisions of *Bombay Regulation VII. of 1827.*

The decision of the Sub-Collector, appointed by the Government to settle the boundary, annulling the award of the *Punchayet*, and assigning a boundary, confirmed on appeal.

Semble.—This Court will not encourage a mere objection of form, that does not affect the substantial merits of the case.

THIS Appeal arose upon a question of disputed boundary. The land, the subject of litigation between the Appellants, the *Mokuddims* (proprietors) of the village of *Kunkunwady*, in *pergunna Jumcundi*, in the Presidency of *Bombay*, and the Respondents, the *Brahmins* of the *enam* (revenue-free) village of *Soorpal*, in *pergunna Gotta*, in the same Presidency, was a small *gudda* or island called *Goheshwar*, which had been formed by the river *Krishna*, dividing itself from its original channel, into two branches, each branch running a short distance in a semicircular course, until the two again formed a junction, thereby enclosing the island in question. At what time the course of the river became so altered did not appear.

13th & 14th
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* Present: Members of the *Judicial Committee*,—The Lord President, (Lord Wharncliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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The dispute between the two villages, respecting the boundary line which passed through this island, had been going on for several centuries. It appeared that the exact quantity of land in dispute, consisted of one and three-quarters *chawurs*, and twelve and three-quarters *tanks* (equal to 80 acres). Both parties admitted that the true line of boundary would be defined by the course of what was formerly called the *Jukhur Sarel*, or stream, flowing through the island, but this stream had long since been choked up by earth and sand ; and the two villages were at issue upon the question of what was its true course.

In the year 1833, orders were issued by the Principal Collector and Political Agent of *Zilla Dharwar*, in which *Zilla*, both the *pergunnas* of *Jumcundi* and *Gotta* were situated, to the *Mamlutdar* (revenue officer) of the *talook Indi*, in the same *Zilla*, to institute an inquiry into the matters in dispute, between the two villages, respecting their boundary, and at his instance, both parties agreed to refer the question to the decision of a *Punchayet* or Court of Arbitration, consisting of the *Zemindars* of the two *pergunnas*, in all nine individuals, who were to repair to the island, and make their award.

Accordingly, on the 7th of *November* 1833, certain instruments were entered into on the part of the Appellants and Respondents, by which they agreed to abide by the decision of these nine individuals, four of whom belonged to the *pergunna* of the Respondents, and five to the *pergunna* of the Appellants. These instruments consisted of a deed of submission, executed on behalf of the Respondents ; a similar deed executed on behalf of the Appellants ; and a joint deed executed on behalf of his Highness, the *Row*

Saheb, the proprietor of *Jumcundi*, and on behalf of the Appellants and of the Respondents ; and the words of each instrument were, "We shall abide by whatever decision the above-mentioned nine individuals will pass."

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Some parol evidence was entered into, and certain documents (including several plans of the locality of the property in dispute) were produced on behalf both of the Appellants and Respondents.

The *Punchayet*, however, took no steps towards deciding the case, and on the 20th of *December* 1833, a report was made by the *Mamlutdar* of the *talook* to the Collector and Political Agent of *Dharwar*, calling his attention to the importance of the case, and urging that a settlement of the question should be hastened. Some directions appeared to have been given towards this purpose, but nothing was done by the *Punchayet*, and after a long delay, in 1835, one of the nine referees being then ill and unable to attend, the Principal Collector and Political Agent of *Dharwar* directed the Assistant-Collector, Mr. *Bazett*, to proceed to the spot and pass a decision on the question. This was communicated by the Principal Collector and Political Agent to the *Mamlutdar* of the *talook*.

On the 3rd of *July* 1835, an Order was made by Government, for Mr. *Shaw*, the Sub-Collector of *Bagulcote*, to proceed to the spot and settle the dispute thus substituting him in the place of Mr. *Bazett* ; and Mr. *Shaw* at once proceeded to the spot ; but before any decision was come to by the *Punchayet*, one of the nine arbitrators died.

The *Punchayet* made an award on the 1st of *August* 1835. This award noticed that the villages of *Soorpal*

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maintained that their boundary extended as far as the *Jukhur Sarel*, and that the villagers of *Kunkunwady* maintained their boundary to be as far as the other side of the *Krishna* river, close by the village of *Soorpal*, as far as the temple of *Sri Buleswara*. It then noticed certain evidence which had been given, but did not purport to decide the question upon any evidence produced, on the one side or the other, but stated the ground of the decision as follows :—
 “It appears, on examining the land in dispute between the two villages, that from the branching of the holy river *Krishna*, to its being joined to the sea, there are several villages on both sides of the river, but it does not appear anywhere that the boundary of a village on one side is intermixed with the boundary of another village on the other side. Such being the case, therefore, it is contrary to the known usage of the country, that the villagers of *Soorpal* should dispute with regard to land on the front of the *Krishna* river on the western side, and in like manner it is wrong for the villagers of *Kunkunwady* to say that their boundary extends as far as the temple of *Buleswara*. Under these circumstances, the claims set up by the villagers of *Kunkunwady* and the villagers of *Soorpal* have been set at nought, and it is hereby decided as follows:—That the great holy river of *Krishna* runs from the front of the village of *Toopchee*, and then breaks forth from the south to the eastward. Now the villagers of *Kunkunwady* should confine their boundary to the west of the said river as far as the low-water-mark in the months of *Magh* and *Phagoon* (the two months in *India* in which the water in the river descends to a particular mark), and the villagers of *Soorpal* should confine their boundary on the east

of the said river. In this manner, neither the villagers of one nor of the other should claim their boundary beyond the edge of the river on each side."

Prior to the publication of this award, the inhabitants of *Soorpal* presented a petition to Mr. *Shaw*, wherein they complained that the arbitrators were under the influence of *Gopal Row Saheb*, the proprietor of the *Juncundi*, and stated that "they were then kept in the place of *Kunkunwady*, where no one had the courage to go and speak to them. Under these circumstances," they proceeded, "we will not agree to any decision they may pass. We have already submitted all our papers and documentary evidence to the Government; therefore let the investigation be had in your honour's presence."

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On this petition the following Order, bearing date the 5th of *August* 1835, was made:—"The petitioners are hereby informed that the members composing the *Punch* (or Court of Arbitrators) are present here, and have passed their decision by writing on the spot, as was written in the *razi-nama*. It is, therefore, requisite to be ascertained whether the petitioners are disposed to agree to abide by the said decision, or not. If the petitioners agree to the same, then let them act accordingly; but if the petitioners do not agree to the same, the whole of the papers, and documents, and the proofs of the enjoyment, &c., shall be duly examined, and a decision thereon will be passed by the *Huzzoor*, and the decree thereof will be delivered to the parties."

On communicating the above to the parties, the inhabitants of *Soorpal* said they were dissatisfied with the decision of the *Punch*, according to which, however, the inhabitants of *Kunkunwady* appeared

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ready to act. Consequent upon the dissatisfaction expressed by the villagers of *Soorpal*, it was ordered that a decision should be passed, after further investigation, in the presence of the authority.

On the 6th *August* 1839, Mr. *Shaw* made his Decree, in which he stated, that he had read the *Punchayet* proceedings, and considered the decision of the *Punchayet* to be an unfair one: he stated also that he considered the *Panchayet* had been nullified; and decreed as follows:—"That the villagers of *Soorpal* should hold and enjoy the land beyond the *Jukhur Sarel*, and the village of *Kunkunwady* in like manner to enjoy the land on this side of *Jukhur Sarel*."

The Appellants appealed from this Decree, to the *Sudder Dewanny Adawlut* of *Bombay*, and filed their grounds of appeal on the 19th of *November* 1835.

The Respondents, in their answer, submitted that the *razi-namas* originally entered into between them and the villagers of *Kunkunwady* were invalid, according to the provisions of Reg. VII., sec. iii., cl. 1, of 1827, inasmuch as no time was limited for the *Punchayet* coming to their decision; they moreover urged that the deed of submission had become invalidated, by reason of the death of one of the arbitrators, named on their behalf, pending the award.

The cause came on to be heard before *Saville Marriott*, Esquire, the senior Puisne Judge, on the 28th and 29th days of *July* 1836, who after observing that the proceedings in the lower Court did not appear in all respects in precise judicial form, but as this defect would not affect the substantial merits of the case, the Court availed itself of the authority vested in it by Regulation XVII., 1827, sec. xxxiv., cl. 2, to

admit the same, recorded his opinion in the following terms:—

“The opponents in the southern bank of the *Krishna* river claim the whole of the island above mentioned, whilst a portion, and at times, even the whole, has been asserted by the northern inhabitants to be theirs. The protracted and violent disputes and affrays regarding boundary questions are notorious, and the present case affords a specimen of the violence and pertinacity with which they are often conducted. Not satisfied with confining the controversy within the *cutcherries*, the parties have occasionally resorted to arms to establish their respective claims, and in some instances, it would appear, lives have been lost, and it is quite obvious, from the papers in the case, that each party has had and held possession of the land in dispute according to the predominance of power or influence at the time in the field, or with the rulers of the country. Each has, therefore, been able to bring forward a mass of documents in support of their respective claims. Many of these, however, are either not authenticated at all, or else they bear an appearance, strongly indicative of being unworthy of reliance, further than that, as taken collectively, they evidenced the above-stated general unsettled state of things, and anarchy in the former administration of the country. Under such circumstances, the first question was, what would be the most likely mode of extracting the truth from such a mass of confusion? and it appears that a *Panchayet* was thought to be the best mode; and one was appointed, it would seem, by the *Mamlutdar* or *Sarrish-tahdar*, but from the manner in which it was constituted, the Sub-Collector, for the reasons assigned by

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him, very properly set aside its award as being absolute; it was not, in short, formed in the manner required by Regulation VII. of 1827, to make its judgment absolute, and from the circumstance that the majority, if not the whole, of the members belonging to the district of the Appellants, which belongs to the chief styled *Jumcundikar*, it appears obvious that impartiality was not observed in forming the *Punchayet*. For these reasons, therefore, the Court overrules the plea advanced by the Appellants, that the *Punchayet's* decision was illegally and improperly superseded by the Sub-Collector. On the contrary, the Court is of opinion that the proceedings of that trying authority were perfectly legal and judicious, in respect to that point. The Sub-Collector moreover adopted and followed that course which, in the opinion of the Court, was the best, if not the only, mode for bringing the dispute to a satisfactory issue; and in the opinion of the Court every and great exertion was used in a highly judicious manner by the Collector to ascertain the respective merits of the claims of the parties, and thereon to found as equitable a decision as the difficult nature of the case could possibly allow, in all of which the Court is of opinion he succeeded, and that the Appellants have established nothing to justify either reversal or alteration in the judgment awarded."

The Appellants having presented a petition, praying for a new trial, which was refused, brought this Appeal to Her Majesty in Council.

Mr. *Charles Buller*, Mr. *Jackson*, and Mr. *Forsyth*,
 for the Appellants.

Both parties having bound themselves by the Deed

of reference to abide by the decision of the *Punchayet*, such award was of binding force and effect, between the parties, and it was not competent to the Respondents to set it aside, and act upon the decision of a different tribunal. Moreover, the decision of the Sub-Collector, which awards the *Jukhur Sarel* to be the boundary between the two villages without clearly defining its true position, which is the chief matter in dispute, leaves the main question undecided: they relied on the *Bombay* Reg. XVII. of 1827, and *Bombay* Reg. VI. of 1830.

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Mr. *Wigram*, Q.C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

Though the submission to arbitration was properly executed, yet it did not constitute a reference within the meaning of the *Bombay* Regulation VII. of 1827. It did not specify any time within which such award was to be given, and regard being had to the course taken by the Government,—the appointment of the Sub-Collector for the purpose of deciding the dispute,—the death of one of the nine arbitrators,—the dissent on the part of the Respondents, and also to the circumstance that the award does not appear ever to have been filed, such award was not to any extent a binding decision on the parties, and the Decree of the *Sudder Dewanny* Court, defining the boundary, was fully warranted by the evidence.

The Vice-Chancellor KNIGHT BRUCE:

Their Lordships have felt, and even with the aid of the information communicated by the Appellants' Counsel, still feel, some difficulty in following some

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parts of the proceedings below ; with regard, however, to the objections merely of form, taken here on the part of the Appellants, after considering them, and especially giving due weight to the observations upon the reference made by the *Sudder* Judge, to chapter 2, sec. xxxiv., of Regulation XVII. of 1827, and upon the 4th and 5th sections of Regulation VI. of 1830, urged by the Appellants' Counsel, their Lordships, though not thinking those objections unreasonably taken, or without colour, do not feel disposed to accede to them.

The tendency of the Judicial Committee since its institution (as of the Privy Council before), has been, not to give way unnecessarily to objections of that nature; and in the present instance, the nature of the jurisdiction whence the appeal comes, the nature of the proceedings themselves, and the course pursued by the Appellants below, render it right, in their Lordships' judgment, to deal with the matter before them upon its substance and its merits. And the case so viewed has mainly two questions. First,—Ought the Court below to have treated the decision of the *Punchayet* as correct and binding? Secondly,—If not, had the Sub-Collector, Mr. *Shaw*, and the Court of *Sudder*, adopted the right line of boundary?

Upon the first question, the Appellants have conceded that the decision of the *Punchayet* is, by the *Bombay* Regulations of 1827, prevented from having the force of a judicial sentence, a judicial determination, or of a regular award in a technical sense; while the Respondents on their side have not denied, that it is receivable in evidence and to be considered as part of the materials in the cause. But its conclusiveness, denied by the Respondents, is asserted by the Appellants, who insist, that it was a binding agreement

between the parties to abide by the *Punchayet's* determination, which they say ought to be upheld. Their Lordships, however, are of opinion, that if there was in effect an agreement to abide by the *Punchayet's* opinion and determination, and if the opinion was expressed and the determination made, by those who it was agreed should do so, (a point not necessary to be decided,) it was nevertheless, and is, the right of the Respondents, to contend that the agreement and determination do not necessarily bind; and to bring forward all the circumstances of the case, for the purpose of showing it to be inequitable, that they should bind. In a word, to resist the Appellants' demand, so far as it rests on what the *Punchayet* did, on grounds analogous to some of those on which the specific performance of an agreement may be resisted in English Courts of Equity. What may be the rule in case of an effectual reference to arbitration, and an award, properly so considered, their Lordships do not think it necessary to say; for in their judgment, having regard to the *Bombay* Regulations of 1827, and the undoubted facts of the case, an effectual reference to arbitration, and an award, properly to be so considered, did not exist in the present instance: though, if there had been an award, their Lordships are not satisfied, that grounds do not appear upon which it is invalid, or might have been set aside. Viewed as matter of agreement, it is their Lordships' opinion, from the circumstances of the case, and the whole course of proceeding, that reliance cannot be placed on what the *Punchayet* have done, and that it would be unjust to enforce their decision against the Respondents.

With regard to the true line of boundary, their Lord-

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ships think that there is sufficient evidence to show that fixed by the *Punchayet* not to be the true line,—a conclusion which they do not solely form from the circumstances, that it did not accord with the case alleged on either side. That the line fixed by the Judgments against which the Appellants have appealed is the true line, does not, in their Lordships' view, clearly appear ; but the evidence does not prove any other line more probable. Assuredly the Appellants have not established, that either of these Judgments is substantially wrong ; and as Mr. *Shaw* appears to have examined the surface of the disputed land himself, and to have bestowed care and attention upon the subject, it does not seem likely that any further investigation can materially advance the cause of truth or justice ; their Lordships, on the whole, consider the right course to be, to dismiss the Appeal but without costs.

ANNE CASEMENT - - - - - Appellant,

AND

JOHN WILLIAMSON FULTON and Wife - Respondents.*

On Appeal from the Supreme Court of Judicature at Calcutta.

Indian Wills Act (1838), s. 7—Construction—Attestation—Sufficiency of—Acknowledgment by witness, if equivalent to signature—“Execute”—Meaning of—Presence of both attesting witnesses—Necessity for.

The 7th section of the Indian Wills Act, No. 25, of 1838, enacts “that no Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the Testator, or by some other person in his presence, and by his direction, and such signature shall be made, or acknowledged by the Testator, in the presence of two or more witnesses, present at the same time; and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary.”

A Testator signed his Will in the presence of a witness, who subscribed it in his presence; and some time afterwards, upon the arrival of another witness, the Testator, in the joint presence of the former witness, and the other subscribing witness, acknowledged his subscription at the foot of the Will. The second witness then subscribed the Will, and the first witness, in his and the Testator's presence, acknowledged his subscription, but did not re-subscribe.

Held by the Judicial Committee (affirming the sentence of the Supreme Court at *Calcutta*), that the requirements of the Act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the Testator, and jointly subscribe it in his presence.

Whether the rules of the Ecclesiastical Courts in Doctors' Commons relating to the doctrine of pre-emption of Appeal, apply to an Ecclesiastical cause in the Supreme Court at *Calcutta*, so as to deprive a party of the Charter right to appeal within six months from the decree, &c. *Quære?*

THIS was an Appeal from a sentence of the Supreme Court of Judicature at *Calcutta*, on the Eccle-
17th 18th &
19th June
1845.

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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siastical side, which rejected an allegation, propounding an instrument, bearing date the 14th of *April* 1844, as the Will of Sir *William Casement*, the deceased in the cause, late a Major-General in the service of the East India Company.

The allegation was filed by the Appellant, as the widow of the deceased, and his Executrix named in the instrument in question, propounding it for proof, in solemn form of law.

The Respondents were the next of kin of the deceased.

The allegation pleaded in substance, that the deceased, while resident at *Cassipore*, in the suburbs of *Calcutta*, was, on the 14th of *April* 1844, attacked by cholera (whereof he afterwards died), and being sensible of the dangerous character of his malady, expressed to Lieutenant-Colonel *Francis Spencer Hawkins*, his intention to leave the whole of his property to his wife, and requested him to lose no time in getting a Will prepared for him to execute, to carry out that intention, and nominating the Appellant Executrix, and Mr. *Brown Roberts* and Colonel *Hawkins* Executors, of such Will. That, pursuant to this request, Colonel *Hawkins* had a Will prepared at *Calcutta*, and on his return with the same to *Cassipore*, he found Mr. *Nicholson*, one of the medical attendants, in attendance upon the Testator, and immediately, in his presence, produced the Will in question to the Testator, who, after reading it over attentively, signed his name at the foot or end of the Will as he lay on his couch, and Mr. *Nicholson*, in whose sight and presence it had been signed, then took the Will and subscribed his name to it, at a table in the adjoining room, which stood in sight of the Testator's couch, there being no

other convenience for writing in the same room ; and Colonel *Hawkins* and Mr. *Nicholson* then awaited the return of Mr. *Garden* from *Calcutta*, in order to complete the execution of the Will. That upon Mr. *Garden*'s arrival at the Testator's, about two hours afterwards, Colonel *Hawkins*, who, with Mr. *Nicholson*, had continued in attendance upon the Testator, produced the Will, and requested him to attest the Testator's signature to it ; Mr. *Garden*, however, required that the signature should be first acknowledged by the Testator in his presence, and the three went up to the couch where the Testator was still lying, when the Testator acknowledged his signature to the Will, and the same to be his Will, in the presence of Mr. *Nicholson* and Mr. *Garden*, present at the same time ; after which, Mr. *Garden* subscribed precisely in the same manner, and under the same circumstances, as Mr. *Nicholson* had done ; and Mr. *Nicholson* at the same time, having already signed and subscribed the Will, thought it unnecessary to subscribe the same again, but acknowledged his subscription, then already at the foot of the Will, both in Mr. *Garden*'s presence, and in that of the Testator. The allegation further pleaded that the Testator was a British subject, and, at the time of his death, was domiciled at *Fort William*—that he left goods within the province of *Bengal*, and within the jurisdiction of the Court.

A caveat against granting probate of the alleged Will, having been entered on the part of the Respondents, they filed an exceptive allegation to the admission of the above allegation or condidit, protesting against the same for its nullity, its inapplicability, its indefinitiveness, its obscurity, and its insufficiency.

The admissibility of the allegation was argued before

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FULTON. Sir *Lawrence Peel*, Chief Justice, Sir *John Peter Grant*, and Sir *Henry Wilmot Seton*, on the 1st of *June* 1844, and the Court took time to consider its judgment until the 8th of *July* following, on which day Sir *Lawrence Peel* delivered the unanimous judgment of the Court, admitting the exceptive allegation, and rejecting the allegation propounding the Will, and decreeing the costs of both parties to be paid out of the estate.

On the 13th of *August*, the Proctor of the Appellant dissented from the sentence of the 8th *July*, and protested of the nullity of the same, and of a grievance, and of appealing from the same within the time allowed by the Charter (a). On the 12th of *December*, the Appellant filed her Petition for leave to appeal from the rejection of the allegation.

This Petition was opposed on behalf of the Respondents, and the matter argued before Sir *Lawrence Peel*, who gave judgment, allowing the appeal.

The Appeal now came on for hearing, when the Respondents' counsel took a preliminary objection to its competency ; contending that, by the true construc-

(a) This part of the Charter is as follows:—"And we do hereby also reserve to 'ourselves, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble Petition of any person or persons aggrieved by a judgment, decree, or decretal or other order or rule of the said Supreme Court of Judicature at *Fort William*, in *Bengal*, to refuse or admit his, her or their appeal therefrom, upon such terms and under such limitations, restrictions and regulations, as we or they shall think fit, and to reform, correct or vary such judgment, decree or orders, as to us or them shall seem meet. Provided always that no appeal shall be allowed by the said Supreme Court of Judicature at *Fort William*, in *Bengal*, unless the Petition for that purpose shall be preferred within six months from the day of pronouncing the judgment, decree or decretal order complained of, and unless the value of the matter in dispute shall exceed the sum of 1,000 pagodas.

tion of the Charter of Justice, which gave the Supreme Court ecclesiastical jurisdiction in *Bengal*, and directed that the Court should be governed by the same rules as the Ecclesiastical Courts in the Diocese of *London*, and the general principles and practice of the Ecclesiastical Courts which prevail in *India*, at the time when the Appellant filed her Petition for leave to appeal, namely, on the 12th of *December* 1844, her right of appeal was lost and pre-empted, no appeal having been asserted within six days. *Voet (a)*, *Greg v. Greg (b)*, *Schultes v. Hodgson (c)*, *Lloyd v. Poole (d)*, *The Ship Clifton (e)*. That the latter part of the Charter giving six months time to appeal from all original judgments, decrees, or decretal or other rules or orders of the Court, did not take away the general Ecclesiastical law, which required that an appeal must be asserted within six days, and that, therefore, the Supreme Court could not legally grant leave to appeal after that time.

Their Lordships did not call upon the Appellant's counsel in support of the right to appeal, and reserved their opinion upon the objection until they gave judgment in the cause.

Sir *Thomas Wilde*, Mr. *F. Kelly*, Q. C., Dr. *Addams*, and Mr. *Kirwan*, for the Appellant ; and

Mr. *Turner*, Q. C., Dr. *Harding*, and Mr. *Malins*, for the Respondents.

The question was, whether the requisites of the 7th section of the Indian Will Act, No. 25 of 1838 (*f*),

(a) Pandect. Lib. 49, Tit. 4. Alciatus de Appellatione, s. 9 & 29.

(b) 2 Add. 276.

(c) 1 Add. 105.

(d) 3 Hagg. Ecc. Rep. 477.

(e) 3 Knapp, P. C. Cases, 375.

(f) This section is a copy of the 9th section of the English Will

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It was argued, that the acknowledgment of the first witness to his previous subscription was equivalent to re-subscription. That an important distinction existed between the 9th section of the English Will Act, 1 *Vict.*, c. 26, and the 7th section of the Indian Will Act, inasmuch as the former Act required that the witnesses should attest and subscribe, whereas, in the latter, the word attest is omitted, and the witness only required to subscribe. *Moore v. King* (a). *In the goods of Byrd* (b). *In the goods of Olding* (c). *Cooper v. Bockett* (d). *Ilott v. Genge* (e). *Hudson v. Parker* (f). That the words in the English Act, "attest and subscribe," in the 9th section, were borrowed from the Statute of Frauds, and should receive

Act, 1 *Vict.*, chap. 26, with the omission of the words, "shall attest." It is as follows:—

"And it is hereby enacted, that no Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the Testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the Testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary."

(a) 3 Curt. 243.

(b) 3 Curt. 117.

(c) 2 Curt. 865.

(d) 4 Moore's P. C. Cases, 419.

(e) 4 Moore's P. C. Cases, 265.

(f) 1 Rob. Ecc. Rep. 14.

the same construction. *Harrison v. Elwin* (a). That by the Statute of Frauds, the validity of a subsequent acknowledgment by subscribing witnesses, of their signatures, was recognised in *Risley v. Temple* (b). *Grayson v. Atkinson* (c). *White v. The Trustees of the British Museum* (d). *Gryle v. Gryle* (e). *Peate v. Ougly* (f). *Ellis v. Smith* (g). *Burdett v. Spilsbury* (h). *Price v. Smith* (i). *Trimmer v. Jackson* (j). *Roberts*, on Frauds, ch. 5, p. 304-308, and Sir *E. Ryan's Charge*. *Smoult's Rules*, 2 vol. App. 51, were also referred to.

LORD BROUGHAM:

General Sir *William Casement* being stricken with cholera, made his last Will in writing, on the 16th of April 1844, in his house, near *Calcutta*, and signed it, in the presence of *Simon Nicholson*, his medical attendant, who also subscribed it in his presence, being in the next room, a few yards from the General, and in full view of him. Another witness, *Alexander Garden*, was brought, some hours after, to the apartment, and signed it, after hearing the General acknowledge his subscription, and Mr. *Nicholson*, his fellow witness, also acknowledged his subscription. Moreover, both the General and Mr. *Nicholson* were present when Mr. *Garden* subscribed. The question, and the only question arising upon the *factum*, is, whether or not the subscription of the two witnesses was so made, as to comply with the statutory requisition, the signature of *Nicholson* being not made but only acknowledged in *Garden's* presence; and the determination of this

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(a) 3 Q. B. Rep. 117.

(c) 2 Ves. Sen. 454.

(e) 2 Atk. 177.

(g) 1 Ves. Jun. 11.

(i) Willes Rep. 1.

(b) Skinner, 107.

(d) 6 Bing. 310.

(f) Comyns' Rep. 196.

(h) 6 Man & Gr. 386.

(j) Cited 4 Burn. Ecc. L. 102-182.

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The Statute of Frauds (29 Car. II., c. 3, s. 5), requires the Will to be signed by the Testator, in the presence of the witnesses ; nevertheless, the construction put upon that important provision has been, that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle, we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things,—as different as the witnessing a fact or act, and the witnessing a confession of that fact or act. But it is too late to raise any such objection ; we may, nevertheless, observe, that the greatest Judges who have dealt with the subject have admitted the force of such considerations, and lamented the latitude given to the statutory provision by their predecessors, who first broke in upon its strictness. When Lord *Hardwicke*, in 1752, was first called upon to adopt this construction, he expressed that it had for a long while been

vexata quæstio ; but still he felt the weight of authority too great to adopt the course he manifestly inclined to. *Grayson v. Atkinson* (2 Ves. Sen. 454). Two years after, the point was more solemnly considered in *Ellis v. Smith* (1 Ves. Jun. 11), and adjudged by the same great lawyer, who then had the assistance of Sir *J. Strange*, M.R., *Willes*, C. J., and *Parker*, C. B. All these eminent men expressed their opinion, that had the question been open, and that they were called upon now to decide it for the first time, they should not have held acknowledgments sufficient. But they found, on examining the cases, that the case was not *res integra*. It had been held, that acknowledgment was equivalent to signing, by Lord *Jefferys* (*Skinner*, 227), by *Trevor*, C. J. (*Com.* 197), and by Lord *King*, in *Dormer v. Thurland* (2 P. W. 260) ; nor was there to be found any conflicting authority except the supposed *obiturdictum* of Lord *Holt*, in *Lee v. Libb* (*Carth.* 35-8), of which *Willes*, C. J., said (1 Ves. Jun. 13), that “many things were ascribed to that great man, which, on examination, his Lordship had found never to have been said by him,” and he adds, that “*obiturdicta*” were frequently “*nunquam dicta*.” Their Lordships, therefore, all considered the matter as not “*res integra*” but “*res judicata*,” and held that it was the safer and wiser course “*stare decisis*.”

We are thus fully warranted in refusing to carry one step further, a construction which so great a weight of authority lamented, and showed to have been ill-advised in its inception, and we are left in no doubt how these eminent Judges would have dealt with the present attempt to extend the latitude already given. They never would have held, that a witness acknowledging his subscription in the presence of his fellow-witness

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FULTON. It is further to be observed, that the new Act expressly allows the acknowledgment of the Testator to be as good as the signature, adopting the construction put on the Statute of Frauds by judicial decision. But it says nothing of the witnesses acknowledging. This is a very strong argument in favour of rejecting the proposed extension ; for surely, had the legislature meant to make acknowledgment equivalent to signing in both cases, the word acknowledge would have been repeated in connection with the attestation ; which it is not.

Let us now see, then, if the other argument of the Appellants is better founded—that which denies the Statute to require a signature of both witnesses in each other's presence.

Here we must observe, that though the Act adopts the large construction, as regards acknowledgment, it imposes new requisitions, as to attestations. The Statute of Frauds did not require that the witnesses to the subscription of the Testator should be present at the same time. But the new Act does require this. The Testator shall sign in the presence of two or more witnesses, present at the same time ; and no doubt this is a most wholesome addition, and one tending to secure the compliance with what was manifestly the intention of the legislature in the older Act ; for, if one witness may be present one day, and another a different day, perhaps at an interval of years, how can we say that both attest the same fact, that important fact for which their presence is required—the capacity of the Testator? He might be sane one day and insane another ; and thus his capa-

city would only be attested by a single witness, because his two different conditions would only have one witness each.

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It is not, perhaps, so important that the witnesses should both sign in each other's presence ; nevertheless, it is of importance, for it gives an additional security against fraud or mistake, the signature being an act—the acknowledgment only a word. But be the reason what it may, if the law has said that the witnesses must sign in each other's presence, we are bound ; and there can be no reasonable doubt raised, that the words of the Act amount to this requisition—the Testator is to sign or acknowledge in the presence of the witnesses present at the same “time.” He is not to sign or acknowledge before the witnesses present at different times. But here he has acknowledged before them, present at the same time. Then must the witnesses who subscribe be present at the same time? We think the words admit of no other construction, for it is “and such witnesses shall subscribe.” Now this forms one sentence, with the preceding words, “present at the same time,” and “such” must plainly be read,—such present witnesses, or such witnesses so being present at the same time. “Such” describes not merely the names of the witnesses, but all that is previously enacted respecting them. One quality of these witnesses is their being present at the same time. Therefore, we cannot limit the meaning of the large word of reference, “such,” to the mere names or persons of the witnesses ; it must embrace what had just been said of their presence ; it must mean “the witnesses, &c., present at the same time.”

To be sure, a very short end would be made of this

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controversy, were we to read the enactment as we are called upon to do in the argument, and, stopping short at the early part of the section, we were to suppose that "executed in manner hereinafter mentioned," refers only to the signing or acknowledging by the Testator, and not to the attestation of the witnesses. But so extraordinary a construction would also make a short end of the whole provision, and would dispense with the necessity of any witnesses at all, and of any subscription by witnesses, whether in each other's presence or not ; for the Statute very probably would be confined to the not executing by the Testator, and no further invalidity could possibly arise from any want of attestation. Nothing can be more hopeless than this argument. It is rested upon the supposed application of the word "execution" to the Testator's part alone ; for they say that the Testator executes, the witnesses attest. But this is utterly untrue. The Testator does not execute ; he makes and publishes. In truth, the word execute applies to a deed, rather than to a will, and occurs not at all in the 5th section of the Statute of Frauds. In the Statute of Wills, 32 *Hen. VIII.*, and 34, 35 *Hen. VIII.*, it occurs, but only as applied to other instruments than Wills ; "other acts," as they are termed. It is certainly to be wished, that in framing Statutes, the same words should always be employed in the same sense, and that the introduction of new terms, in dealing with the same matter, should be avoided. Yet we cannot say that the word "execute" is used by the framers of this Act, in any other than a correct and technical sense. It is employed plainly to designate the whole operation, including both the signature or acknowledgment of the Testator, and the attestation of the sub-

scribing witnesses, and it is not used at all to designate the Testator's part alone. The same use is made of the word in the great case already referred to, of *Ellis v. Smith*. Lord *Hardwicke* (1 Ves. Jun. 16) afterwards uses execution to mean the whole operation. The Master of the Rolls (*ib.* 14) uses it in the same sense. The Chief Justice and Chief Baron use it to designate the making and publishing. Nay, the learned persons who drew up the present Appellant's case, and who use this argument, have, in one page of their case, used the word in all its senses, both as designating the making and publishing by the Testator, and the whole act of making, publishing, and attesting. We, therefore, at once reject the argument, grounded upon this commentary on the word executed.

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Agreeing altogether, as we do, with the Court below, on the merits, we are relieved from the necessity of deciding the preliminary question, whether or not the proceedings of the Appellant pre-empt this Appeal. Had we differed with the Judgment below, we must have disposed of that question. It now becomes wholly unnecessary so to do. We only say that our present Judgment does not in any way touch it, and that we certainly give no opinion at variance with the law and practice of Doctors' Commons on this head. The question does not come before us.

The Judgment appealed from must be affirmed. The costs of all parties, both here and below, to come out of the estate.

HENRY FAWCETT and others - - - Appellants,
 AND
 THE JUSTICES OF BOMBAY - - - Respondents.*

*On Appeal from the Supreme Court of Judicature at
 Bombay.*

*Highway rate—Principles of assessment—Statute 33 Geo. III, c. 52,
 s. 158—Construction.*

By Stat. 33, Geo. III., c. 52, s. 158, (for, among other things, making better provisions for the good order and Government of the towns of *Calcutta*, *Madras* and *Bombay*,) assessments are directed to be made on the owners or occupiers of houses, buildings and grounds, “ac-
 cording to the true and real annual values thereof.”

Upon a rate made in pursuance of this Statute, the Quarter Sessions at *Bombay* assessed the annual value of a cotton pressing factory, having fixed machinery, upon the gross receipts, after making an allowance of ten per cent. for tenants’ profits. Held by the Judicial Committee, reversing the Order of Confirmation of the Sessions, by the Supreme Court, and quashing the rate, that the principle of the assessment was erroneous, the proper measure of rateable value of the building being the rent (subject to the deductions required by the Statute 6 and 7 Wm. IV., c. 96) that the building might reasonably be expected to be let for, to a yearly tenant.

19th & 20th
 June 1845.

ON appeal by the Appellants, against a rate, made on the 13th of *February* 1844, for cleansing, watching and repairing the streets in *Bombay*, under the Statute 33 Geo. III., c. 52, s. 158,† upon certain warehouses and

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

† “That it shall and may be lawful to and for the Justices of the Peace within or for the Presidencies of *Fort William*, *Fort Saint George*, and *Bombay*, respectively, for the time being, or the major part of them, from time to time assembled at their General or Quarter Sessions, to appoint scavengers for cleansing the streets of the said towns or factories of *Calcutta*, *Madras*, and *Bombay*, respectively, and to nominate and appoint such persons, as they shall think fit in that behalf, and also to order the watching and repairing of the streets therein, as they respectively shall judge necessary, and for the purpose of defraying the expenses thereof from time to time to make an equal assessment or assessments, on the owners or occupiers

premises situate at *Bombay*, and known as the Apollo Cotton Screw and Presses, belonging to the Appellants. The rate was appealed against, to the Quarter Sessions of *Bombay*, and was by that Court confirmed, subject to the opinion of the Supreme Court of Judicature at *Bombay*, upon the following special case.

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By articles of agreement made and entered into on the 16th of *August* 1837, certain European, Mahomedan, Hindoo and Parsee merchants of *Bombay*, to the number of thirty, interested in the cotton trade,

of houses, buildings, and grounds, in the said towns or factories respectively, according to the true and real annual values thereof, so that the whole of such assessment or assessments shall not exceed in any one year the proportion of one-twentieth part of the gross annual values thereof respectively, unless any higher rate of assessment shall in the judgment of the Governor-General in Council, or Governor in Council, of the said respective Presidencies, become essentially necessary for the cleansing, watching, or repairing thereof, in which case the said Governor-General in Council, or Governor in Council, shall, and may, on any such urgent occasion, by Order in Council, authorise a further assessment, not exceeding in any one year the half part of the amount of the ordinary annual assessment hereinbefore limited ; and that it shall be thereupon lawful for the said justices to make a further assessment according to the tenor of such order, and not otherwise, or in any other manner ; and that all and every such assessment or assessments shall, and may, from time to time, be levied and collected by such person or persons, and in such manner, as the said justices, by their order in session, shall direct and appoint in that behalf, and the money thereby raised shall be employed and disposed of, according to the orders and directions of the said justices in session respectively, for and towards the repairing, watching, and cleansing the said streets, and for no other purpose ; and that the said assessments being allowed, under the hands and seals of such justices, or any two or more of them, shall and may be levied by warrant under their hands and seals, or the hands and seals of any two of them, by distress and sale of the goods and chattels of any person or persons not paying the same within eight days after demand, rendering the overplus (if any be) to the same person or persons, the necessary charges of making, keeping, and selling such distress or distresses being first deducted."

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agreed to carry on in copartnership together at *Bom-
bay*, from the 1st day of *May* 1836, until the 30th
day of *April* 1856, the business of storing, screwing,
and packing cotton, in certain houses and premises
known as the Apollo Cotton Screws, under the name,
style and firm of the Cotton Press Company, and
undertook to promote, by all possible lawful ways and
means, the interest of the said copartnership, and
agreed, that should any member of the said copartner-
ship employ any other cotton screw or screws, than
those belonging to the said Apollo Cotton Press Com-
pany, without previously assigning a satisfactory rea-
son to the managing committee of the copartnership,
such member should not only forfeit his dividend or
dividends for the year, but a fine of one thousand
rupees for each share in the copartnership, held by
such member, should be levied.

Under the above agreement, which is in full force
and operation, the Company are now in the occupation,
as owners, of two large warehouses, situate respectively
in *Marine* and *Apollo streets* within the Fort Walls of
Bombay. In those warehouses, extensive and powerful
machinery is erected and supported by strong masonry,
and sunk in and affixed to the soil, by means of which
cotton is compressed and packed into bales ready for
shipment and exportation.

The purchase-money of the above buildings amount-
ed to two *lakhs* of rupees; the cost of paying and
erecting the machinery therein, amounted altogether
to the sum of eight *lakhs* of rupees.

By the aid of cotton press machinery a bale of cot-
ton, standing from four to four and a half feet high,
when brought to the warehouse, is reduced to two feet,
and then packed and corded very strongly ready for
measurement and shipment.

No impressed cotton is exported from *Bombay*.

There are four other cotton screws existing, and in operation in *Bombay*.

The motive power in all these screws is applied by men using capstan bars, as in a ship, but in the presses of the Company, although the motive power is the same and applied in the same manner as in their own and the other screws, less human labour is required, owing to the peculiar nature of the machinery.

The average total number of bales of cotton, annually prepared for exportation, at the several presses and screws in Bombay, amounts to about four hundred and fifty thousand.

Of this number, one hundred thousand bales, or two-ninths, belong to the members of the Company individually, and are prepared at their presses; of the remaining bales, two hundred thousand at the least are also pressed at the Apollo presses.

A rupee and a half is charged, as well at the cotton presses and screws of the Company, as at the private screws, for compressing and packing a bale of cotton.

No other charge is made, or fee received, by the Company or owners of the other screws.

The gross receipts of the Company during the year immediately preceding the assessment were Rupees 450,000

The expenses of management, office, establishment, &c., keeping the property in repair, insurance, taxes payable to Government, including an allowance of ten per cent. on the gross receipts for tenants' profits, were Rupees 150,000

Leaving a net residue of Rupees 300,000

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The cotton presses or screws in the island of *Bombay*, have not, previously to the present rate, been assessed, as improving the value of the buildings in which they have been erected and worked.

The rate which has been imposed by the Justices, under the provisions of the 33rd *Geo. III.*, c. 52, sec. 158, has been confirmed on two principles: First, That the true and real annual value of the warehouses and premises, on which the Company carry on their business, is to be estimated according to the rent, at which the premises might reasonably be expected to let for a year, to a tenant enjoying all the profits and advantages which accrue to the Company, from the pressing of their own cotton under the terms of their partnership agreement: and that such rent must be assumed, for the purposes of the rate, to be the gross receipts of the Company, derived from pressing and packing cotton (whether belonging to the Members of the Company or not), or otherwise for the use of their warehouses, minus the actual expenditure incurred in the management and conduct of the business, repairs to the machinery and building, insurance, taxes payable to Government, and other outgoings, and a reasonable allowance for tenants' profits.

Secondly, That in estimating, for the purposes of the rate, the true and real annual value of the premises, by the rent, at which they might reasonably be supposed to let to a tenant from year to year, not entitled to the advantages enjoyed by the Company, under the terms of their partnership contract, the Justices must assume such rent to be the present gross receipts of the Company, less the disbursements, above mentioned, and reasonable allowance for tenants'

profits; for as the aggregate quantity of cotton annually exported from *Bombay*, must be divided amongst the five, and only cotton presses and screws, now existing, and in operation, the quantity prepared at one press or screw for exportation, cannot be diminished, without an increased resort to the others; and as the Justices could not assume, for the purposes of the assessment, a probable increase of employment in the other presses, so they cannot assume that there would be a decrease in the resort to the presses in question, if in the hands of a tenant. The Company, on the other hand, contend, that as the cotton presses in this island have never hitherto been assessed, as improving the value of the buildings in which they have been worked, they ought not now to be assessed on such improved value; but that even if they are liable to be assessed, on such improved value, that under the 158th section of the 33rd *Geo. III.*, c. 52, the thing to be rated is the building, according to the true and real annual value thereof; that, therefore, the building, with the fixtures annexed, is the thing to be rated, and that its value is what it would let for, exclusively of the profits of the trade carried on therein, or that rent which the Company would be forced to pay, if the premises were not their own property; and that to rate the building upon the principle contended for by the Respondents, would be, not to rate the building, but to rate the industry and capital of the owners, and the quantity of labour and current expenditure which they laid out on the premises, and that inasmuch as it is impossible (otherwise than from the rate hereinbefore stated) to obtain evidence of what particular sum the buildings, with the machinery therein, would produce, if let at an annual rent, to persons

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Money invested in the erection of dwelling-houses, or warehouses, or buildings of any nature, in *Bombay*, does not produce, on the average, under any circumstances, more than six per cent. per annum, net profits.

The questions for the opinion of the Court are, whether the Company are rateable upon the principles on which the assessment has been made, or on either of those contended for by the Company, that is to say,—

First, Whether the machinery and presses have been properly taken into consideration, in estimating the assessible value of the premises, either as being part of the buildings and warehouses themselves, or as improving the annual value thereof, or whether the rate should not have been confined to the buildings alone.

Second, Whether, assuming the Court to adopt the affirmative of the first part of the above question, the rateable annual value of the premises is that at which they might be supposed to let to a tenant for a year, entitled to the advantages which the Company now enjoy under their partnership contract; and, if so, whether that rent has been properly estimated, by taking the gross receipts of the Company, minus the expenditure above mentioned.

Third, Assuming the Court to adopt the affirmative of the first, and the negative of the second question, the question then will be, whether the rent at which the premises might be supposed to let to a tenant for

a year, not entitled to the advantages now enjoyed by the Company under their partnership contract, should not be estimated by the gross receipts of the Company, less the deductions before mentioned, according to the second principles on which the rate was confirmed ; or, whether it should be estimated by the amount, exclusive of the profits of the trade carried on therein, or that rent which the Company would be forced to pay if the premises were not their own property ; whether the rateable annual value of the premises should be estimated by the gross receipts of the Company, less the deductions before mentioned, on either of the principles on which the rate has proceeded.

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Whether the amount, for which the premises in question are liable to be rated, is not that sum exclusive of the profits of the trade carried on therein, which the Company would be forced to pay for them if the premises were not their own property ; and whether, for the purposes of this rate, that sum must not be assumed to be rupees sixty thousand, or six per cent. on that sum which the buildings and the machinery therein have cost the Company.

If the Court should adopt either of the principles, on which the rate has been made, the rate is to be confirmed ; should the Court be of opinion that the machinery has been improperly taken into consideration, in estimating the assessible value of the premises, the rate is to be reduced to rupees nine hundred.

And if the Court should be of opinion, that although the machinery has been properly included, the rent at which the whole would let to a tenant should be assumed at six per cent. interest, on the amount of capital laid out in the purchase and erection of the

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buildings and machinery, then the rate is to be reduced to rupees three thousand.

On the 13th of *September* 1844, the Special Case was argued before the Judges of the Supreme Court, who thereupon ordered and adjudged, that the said rate should be confirmed, with costs.

The Appellants, having obtained leave of the Supreme Court, brought the present Appeal.

Mr. *F. Kelly*, Q. C., Mr. *S. Wortley*, Q. C., and Sir *John Bayley*, for the Appellants.

The judgment of the Court cannot be maintained. The principle upon which the warehouses and premises have been rated and assessed, is not the true or correct principle. It proceeds upon the authority of *The Queen v. The London and South Western Railway Company* (a). *The Queen v. The Grand Junction Railway Company* (b). Neither of these cases apply. They relate to poor rates, and have arisen upon Railways. The present is a highway rate founded upon the Statute 33 *Geo. III.*, c. 52. The 52nd section directs the rate to be made on houses, buildings and grounds, according to the true and real annual value thereof ; there is nothing which can include trade, profits, fixtures, or stock in trade, yet the rate imposed is a rate upon the profits, derived by the Appellants from the use and application of the machinery, employed by them within the warehouse and buildings. It is a rate upon the skill, industry, and personal exertions used and employed by the Appellants, in the exercising and carrying on of the business and the profits of the Appellants, especially derived therefrom. The rate has been made

(a) 1 Q. B. Reps. 558,

(b) 4 Q. B. Reps. 18,

and assessed in the absence of any legal or sufficient proof of the rateable value, even if made on a correct principle. The proper allowances and deductions from the gross annual value of the premises have not been made, which are essential to ascertain the legal rateable value. The Court at *Bombay* made a deduction of ten per cent. on the gross receipts for tenants' profits, which is not a sufficient or proper allowance. In the cases of *The Queen v. The London and South Western Railway Company*, and *The Queen v. The Grand Junction Railway Company*, twenty per cent. was deducted. They have made no allowance for outlay of capital, or for a fund to restore. All they have done is to take for granted that the income and profits of the Appellants amounts to £30,000 a-year, and upon that they found the rate. The Statute, 33 Geo. III., c. 52, s. 158, says, "annual value," and this must mean as between landlord or tenant, such as would be obtained by letting. This construction is fortified by section 1, chap. 96, of the 6th & 7th Will. IV., which declares it to be the net annual value, that is, the rent at which the same might reasonably be expected to let from year to year, free from the usual tenants' charges. There is, moreover, a fatal objection; it does not sufficiently appear from the case, upon what property the rate is imposed.

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Their Lordships stopped the Appellants' Counsel, and called upon

Mr. Sergeant *Channell*, and Mr. *O. Malley*, for the Respondents, to support the order of Sessions.

It sufficiently appears from the case what the principle was upon which the rating was made. It was

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made expressly upon the premises called the Apollo press, and this description is correct. A toll-keeper is rated for the amount the tolls would procure. No difficulty can occur as to the identity of the property rated.—[Lord *Brougham*: Can you maintain that the value of the machinery is the value of the profits obtained by its working?—The rate is ascertained at that sum, which a tenant might give with this advantage.—[Lord *Brougham*: The case does not show that. It shows that the Court has measured the value by the profits made by the Appellants.]—The Sessions did the same in *The Queen v. The London and South Western Railway Company* (a). This is not a case in which a building is used for the mere purpose of carrying on a trade in it, but it is by the building and machinery (which is part of the freehold) that the trade is carried on and the profit made. It has been established in *Rex v. Hogg* (b), *Rex v. Justices of Saint Nicholas* (c), *Rex v. Bradford* (d), *Rex v. Lord Granville* (e), *The Queen v. The Cambridge Gas Company* (f), that in estimating the annual value of buildings, all engines and machinery fixed to the freehold are to be taken into consideration, as enhancing the value. And the proper criterion of value is the amount of rent which it may be supposed that a tenant would give for the premises, with a view to use them for the same purpose as that for which the Appellants employ them—*The King v. The Inhabitants of Lower Mitton* (g)—such tenant being assumed to be in the same circumstances, and possessed of the same advantages for so using them,

(a) 1 Q. B. Reps. 558.

(b) 1 Term Rep. 721.

(c) Cald. 262. S. C. cited 1 Term Rep. 723.

(d) 4 M. & S. 317.

(e) 9 B. & C. 188.

(f) 8 Add. & El. 73.

(g) 9 B. & C. 810.

as the Appellants were: and this is the principle upon which the Courts have proceeded in *The Queen v. The London and South Western Railway Company* and *The Queen v. The Grand Junction Railway Company*, and by which this case must be governed. The peculiar advantage the Appellants enjoy in the monopoly of trade, is a fair ground for rating them at the gross receipts.

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Their Lordships, without calling upon the Appellants' Counsel to reply, delivered judgment, by

The Vice-Chancellor KNIGHT BRUCE:

The question is, whether the Appellants, who by the rate in dispute, made the 13th of *February* 1834, have been assessed upon no less an amount than 300,000 rupees, have by it, under the Statute 33 *Geo. III.*, c. 52, sec. 158, been duly and equally assessed as owners or occupiers of houses, buildings, or ground, according to their true and real annual value. Unless they have been so assessed by the rate, the Appeal is well founded. It has been argued for the Appellants, that it does not sufficiently appear from the materials before their Lordships, what the rate is, or of what house or buildings, ground or grounds, the Appellants have been assessed as owners or occupiers. If there is any foundation for this argument, or any importance in the point, it is in the Appellants' favour. But their Lordships, not wishing to rest their decision upon it, decline giving any opinion upon the question. Assuming this objection to be out of the way—that is, assuming the rate to appear, and the Appellants to have been rated in respect only of rateable property, occupied by them, of a specified and properly ascertained nature—their Lordships think it manifest that the assessment, as far as the Appel-

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lants are concerned, was on a wrong principle. If it was legitimate, or proper, to introduce into the calculation of the true and real annual value of the property in question, or to refer, for the purpose of the calculation, to the elements or circumstances which the Justices and the Court of Quarter Sessions have introduced, or referred to, other and further elements, or circumstances, ought also to have been referred to, or introduced, which do not appear to have been so introduced, and which cannot be assumed to have been so introduced.

An examination of the case of *The Queen v. The Grand Junction Railway* (4 Q. B. Rep. 18), in comparison with the case which was before the Supreme Court in the present instance, will sufficiently explain their Lordships' meaning in this respect. But are even the principles on which the decision in the Court of Queen's Bench proceeded, applicable to such a case as the present? Their Lordships are not satisfied that they are. If of two manufacturers in the same street, carrying on precisely the same kind of business, by means of fixed machinery, one makes an annual profit of £2,000 per annum, the other an annual profit of only £1,000 per annum, that circumstance, if the respective buildings and machinery do not materially differ in size, description, extent, or quality, cannot render the one liable to be assessed at a higher rate than the other. The greater or less degree of success, with which a trade or manufacture is conducted, in a warehouse, or manufactory, or other building, having or not having fixed machinery, depends on many and various contingencies and circumstances, of a nature foreign to the mere capabilities of the warehouse, manufactory, or building, and cannot

form a just ingredient, in any calculation, of its true and real annual value.

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The test or definition afforded by section 1, of the Statute 6 & 7 Will. IV., c. 96, in these words—“The net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let, from year to year, free from all usual tenants’ rates and taxes, and to the commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any necessary, to maintain them in a state to command such rent,”—seems to their Lordships substantially a correct test or definition to be applied under the Statute 33 Geo. III., c. 52. And they are satisfied that the application of the test or definition, to that which has been done in the present instance, is destructive of the rate. They are satisfied that no such principle was followed or kept in view. There must be judgment, therefore, for the Appellants, and the costs which they were ordered to pay below, if paid, must be refunded.

Their Lordships desire it particularly to be understood, that they do not mean to express or intimate any opinion against the rateability of fixed machinery, or any opinion how this case might have stood, if the business which at the warehouses, and with the machinery in question, the Appellants carry on, could not be carried on at *Bombay*, by any other persons than themselves, or in any other warehouse or place there, than the warehouse in question, or by any machinery, except the very identical machinery, used by them.

FRAM-JEE COWAS-JEE - - - - - Appellant,

AND

WILLIAM THOMPSON and HENRY KEBBEL - Respondents.*

*On Appeal from the Supreme Court of Judicature at
Bombay.*

*Contract—Construction—Contract for sale of goods “free on board”—
Delivery on board—Property in goods if passes to buyers—Right of
seller to stop in transit.*

Goods contracted to be sold and delivered “free on board,” to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman, employed by the sellers, who handed the same over to them. The sellers apprized the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate’s receipts for the goods, but the master signed the bill of lading in the purchasers’ names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at *Bombay*), that trover would not lie for the goods, for that on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser.

20th & 21st
June 1845.

THIS was an Appeal from a judgment for the Respondents, given on the 25th of November 1844, in an action of trover, on the plea side of the Supreme Court of Judicature at *Bombay*, in which the Respondents were the Plaintiffs, and the Appellant was the Defendant.

The Respondents, during the time to which the

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Vice-Chancellor Wigram, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

transactions in question relate, were merchants of the City of *London*, carrying on business in co-partnership as lead and tin plate merchants, under the firm and style of *William Thompson and Co.* And the Appellant, during the same period, was a merchant and *Parsee* inhabitant of *Bombay*, and the sole owner of the ship *Buckinghamshire*.

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The declaration was filed on the 23rd of *June* 1842, and alleged that the Respondents “were possessed as of their own property,” of certain pigs of lead therein mentioned, and that the Appellant afterwards converted them to his own use.

The Appellant, confessing the conversion, pleaded to the declaration, one plea only, denying that the pigs of lead were the property of the Respondents in manner and form as they had alleged, and thereupon issue was joined.

Commissions for the examination of witnesses on behalf of the Appellant and Respondents were issued, and evidence taken in *London*, under them.

On the 25th day of *June* 1844, the action came on to be tried before the Supreme Court.

The case proved on behalf of the Respondents, was, that on the 12th of *November* 1841, while the ship *Buckinghamshire* was lying in the East India Docks in the Port of *London*, in charge of *William Stockley*, the ship’s husband and manager, employed in that capacity on behalf of the Appellant, the Respondents employed their lighterman, to put on board the pigs of lead in question, in two parcels ; and he received from the Respondents, with the lead, two forms of receipt, therein set forth, written wholly by their clerk. That on the same day the pigs of lead were duly put on board the *Buckinghamshire* by the

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THOMPSON. Respondents' lighterman, who handed in the forms of receipt for the mate's signature, and that he then duly signed them, and returned them to the lighterman, who, two or three days afterwards, returned them so signed to his employers, the Respondents, and that from that time, and during all the time of the transactions in question, those receipts for the lead were retained by, and had remained in the possession of, the Respondents. It was also proved on behalf of the Respondents, that the firm of Messrs. *Boggs, Taylor* and Co. (who were the real shippers of the lead) became insolvent, and stopped payment on the 18th of *December* 1841; that on the 20th and 29th of *December* 1841, whilst the *Buckinghamshire* still lay in the East India Docks, with the lead on board, possession of the lead was duly demanded on behalf of the Respondents, with an offer to pay all freight due upon it, and all other reasonable charges attending the re-delivering of it, which offer was refused on behalf of the Appellant, and that a certain bill of exchange for £1,218. 0s. 8d., which had been accepted by Messrs. *Boggs, Taylor* and Co., on account of the lead in question, remained in the hands of the Respondents unpaid, having been dishonoured by Messrs. *Boggs, Taylor* and Co. when it fell due.

The case of the Appellant was, that on the 30th of *October* 1841, the Respondents contracted to sell to Messrs. *Boggs, Taylor* and Co., 100 tons of British Pig Lead, "free on board, at £20 per ton, 6 months acceptance," "or 2½ per cent. discount, for cash," at the option of Messrs. *Boggs, Taylor* and Co., and that the lead in question was shipped in pursuance of that contract. That on the 2nd of *November* 1841, Messrs. *Boggs, Taylor* and Co. addressed a letter to Messrs. *Daniel*

Dickenson and Co., requesting them to insure the lead ^{1845.} in question, and to accept two bills of exchange, drawn ^{COWAS-JEE} on them by Messrs. *Boggs, Taylor* and Co. for £1,500 ^{v.} ^{THOMPSON.} each, dated respectively the 29th of *October* 1841, and the 1st of *November* 1841, payable respectively six months after date, on the faith of Messrs. *Boggs, Taylor* and Co. placing in their hands the lead in question, or the bills of lading relating thereto, with other lead and with copper of the value of £2,000, which bills of exchange were accepted by Messrs. *Daniel Dickenson* and Co., on the 2nd of *November* 1841, and long before the shipment of the lead by the Respondents, and were handed over by them to Messrs. *Boggs, Taylor* and Co., and paid when due. That the policies of insurance were effected, and that Messrs. *Boggs, Taylor* and Co. were debited by Messrs. *Daniel Dickenson* and Co. with the costs of such insurance. That on the 16th of *November* 1841, the captain of the *Buckinghamshire*, without requiring the delivery to him of the receipts for the lead in question, before referred to, signed four bills of lading of the lead in question, dated the 15th of *November* 1841, prepared by Messrs. *Boggs, Taylor* and Co., describing it as shipped by Messrs. *Boggs, Taylor* and Co., and to be delivered to Messrs. *B. & A. Hormajee*, or to their assigns, which bills of lading were afterwards endorsed by Messrs. *Boggs, Taylor* and Co., in blank, and delivered by them to Messrs. *Daniel Dickenson* and Co. That on the 26th of *November* 1841, Messrs. *Boggs, Taylor* and Co., declining to pay for the lead in cash, accepted the dishonoured bill of exchange for £1,218. 0s. 8d. before mentioned, which was dated the 12th of *November* 1841, being the date of the shipment, and was drawn on them by the Respondents,

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THOMPSON. and was accepted by Messrs. *Boggs, Taylor* and Co., on account of the lead in question, and made payable six months after date.—The Appellant also proved that, according to the usage and custom of merchants in *London*, where goods are sold to be delivered free on board a ship, it is part of the seller's duty, under the contract, to ship them, but that in such cases the buyer, at whose risk they are from the time of shipment, is considered to be the shipper—that where goods are sold on a contract, to be delivered free on board, to be paid for by bill, and are shipped on board and a bill given, pursuant to the terms of the contract, it is the seller's duty, on receipt of the bill, to deliver up the mate's receipt (if any), to the buyer, and that the seller's retention of the mate's receipt, after such bill given and received by the seller, would give the seller no claim against the ship-owner or the broker, or the goods, and maintained that the possession by the Respondents, of the receipts for the lead, did not affect their property in it.

The Court, after considering the evidence, found that the pigs of lead were the property of the Respondents, as they alleged in their declaration, and thereupon judgment was given for the Respondents, from which the Appellant appealed.

Mr. *F. Kelly*, Q. C., Mr. *S. Wortley*, Q. C., and Sir *John Bayley*, for the Appellants.

In this case, your Lordships sit as a jury as well as judges ; you have to find a verdict upon the facts contained in the evidence taken under the Commission.—[Lord *Brougham*: We try all the Court below tried ; we are not a Court of Error.]—The question to be

decided is this ; whether there was a complete and perfect delivery when the lead was put on board. If so, the *transitus* was at an end. If it was not, the legal possession was undoubtedly in the sellers, and they could stop the goods. We submit that the *transitus* was completed by the shipment of the goods. —[Lord Brougham: Mr. Justice *Le Blanc*, in *Busk v. Davis* (a), clearly lays it down that if anything remains to be done, between the buyer and seller, the goods may be stopped.]—By the terms of the contract between the sellers and the purchasers, the latter agreed to purchase the lead in question, and to pay for it by cash or bill, at their election, when delivered to them free on board a ship, to be named by them. The sellers accordingly delivered the lead, by their direction, free on board the ship *Buckinghamshire*, and having done so, delivered an invoice, stating that they had so done ; and having been apprised of the purchasers' election to pay by bill, drew a bill upon them for the price of the lead, which bill was accepted by the purchasers and delivered to the sellers, and thereby the transaction of sale and delivery was completed. The shipment was a complete delivery to the purchaser within the terms of the contract, and the right to stop, *in transitu*, did not exist after such delivery. The circumstances of the lead being shipped on account of the purchasers, distinguishes the case from *Craven v. Ryder* (b), *Ruck v. Hatfield* (c), and *Thompson v. Trail* (d). In these cases the goods were shipped on account of the sellers. The taking the ship's husband's receipts

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(a) 2 M. & S. 403.
(c) 5 B. & Ald. 632.

(b) 6 Taunt. 433.
(d) 6 B. & C. 36.

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THOMPSON. was never intended, and did not operate in law, to control the right of possession or property in the lead, and its retention was accidental, and was alike devoid of such intention. It gave them no better title to the lead, than if they had delivered the mate's receipts to the purchasers, on receiving their bill in payment, the receipts being retained by them under circumstances which had no reference to the title. The Supreme Court has wholly disregarded the legal effect of the evidence given on the part of the Defendant, and has assigned to the Plaintiffs possession of the mate's receipts, an effect unwarranted by law, and the usage and custom of merchants. The object of the retention, was a question of intention for the Court to decide upon the evidence, and such evidence proved conclusively, that the sellers did not, after they received payment for the lead by bill, retain possession of the mate's receipts with the intention of continuing or retaining any property in, or control over, the lead. In the absence of any notice from the sellers to the Defendant or his agents, not to make out and deliver to the purchasers, bills of lading, the Defendant was bound to make out, sign, and deliver bills of lading to, and at the request of, the purchasers, to the holders of the bill of lading.

Serjeant *Channell*, and Mr. *Peacock*, for the Respondents.

The lead must not be considered to have reached its journey's end. The shipment was not a complete delivery of it by the sellers to the purchasers, and on their insolvency they were entitled to stop the lead *in transitu*. *Miles v. Gorton (a)*. No case has

(a) 2 Cr. & Mee. 504.

been cited against the sellers' right to stop *in transitu*. ^{1845.}
 The signing of the receipts by the ship's husband was ^{COWAS-JEE}
 an admission, that the lead continued to be the pro- ^{THOMPSON.}
 perty, and subject to the order, of the sellers, and
 they retained their property in the lead, as long as
 they retained the receipts for it. The goods were
 sold under a contract to deliver them on board the
 ship to be named by the purchaser. In such a case,
 the seller retains his property in the goods, by taking a
 receipt for them, from the person in charge of the
 ship ; and so long as he keeps this receipt in his own
 hands the shipment is not a complete delivery to the
 buyer. *Craven v. Ryder* (a). *Abbott on Shipping* (b).
 He still retains his right, if the receipt be refused him
 at the time of shipment, and the master afterwards
 sign and deliver a bill of lading to the purchaser who
 becomes insolvent, after the departure of the ship.
Ruck v. Hatfield (c). Neither did the signing of the
 bill of lading to the purchaser affect the sellers' right
 to stop the goods. *Thompson v. Trail* (d). The receipts
 were the proper evidence of the sellers' property in
 the lead ; the signing, therefore, by the captain of
 the vessel, of the bills of lading, for the lead, without
 requiring the delivery of the receipts for it, did not
 pass the sellers' property in the lead from them to
 third persons. In *Craven v. Ryder*, Chief Justice
Gibbs, in giving judgment, says, "the person in pos-
 session of the lighterman's receipt, is the person en-
 titled to the bill of lading, which ought to be given
 only to the holder of the receipt." No distinction
 exists in that case from the present, except

(a) 6 Taunt. 433.

(b) 6 Edit.

(c) 5 B. & Ald. 632.

(d) 6 B. "

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form of the receipt. The receipt has never been parted with by the seller.

Lord BROUGHAM:

25th July. Messrs. *Boggs, Taylor* and Co. bought of Messrs. *Thompson* and Co., in the city of *London*, 100 tons of British pig lead "free on board," at £20 per ton, to be paid for by acceptances, at six months, upon delivery on board, or in cash at 2½ per cent. discount; at the option of the sellers. The lead was delivered on board, and receipts taken by the lighterman, from the mate of the vessel, which vessel was chosen and indicated by *Boggs, Taylor* and Co., the purchasers. The sellers elected to be paid by acceptances at six months, which they immediately received from the purchasers, and the latter having failed soon after, both after they accepted the bill and after the master of the vessel had signed bills of lading. The question arose at *Bombay*, in an action of trover, by the Appellants, the dispute being, whether these goods were *in transitu*, so as to give *Thompson* and Co. a right of stoppage, or had reached their journey's end, and were completely vested in the purchasers, *Boggs* and Co., and their assignees, under the bill of lading.

It is proved beyond all doubt, indeed it is not denied, that when goods are sold in *London*, "free on board," the cost of shipping them falls on the seller, but the buyer is considered as the shipper. The argument of the Respondent and of the Court below, we must presume (having no note of the reasons for the judgment under Appeal), is, that the mate's receipt was never given up by *Thompson* and Co., to *Boggs, Taylor* and Co., and that, therefore, the sale was not completed, the delivery was imperfect, something remained

to be done, and the transaction was not finished, nor the *transitus* determined.

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We are clearly of opinion, that the non-delivery of the receipt can operate nothing whatever, and on this plain ground, that *Thompson* and Co. ought to have delivered it up ; it was their clear and bounden duty so to do ; and it would be preposterous that they should avail themselves of their own wrong against the other party, whom they had injured. What possible right, could they have to retain the receipt, which belonged to *Boggs, Taylor* and Co., as much as any chattel in their possession? It is admitted by one of the firm, in a conversation sworn to by a witness, and not in the least contradicted by any other evidence, or by his cross examination, that if the receipt had been asked for, it would have been given up. This was a matter of course. Either a mere oversight, or a fraud, must have caused its being retained, after the acceptance was taken on the delivery of the goods—which acceptance was a payment in substance ; for a payment in cash would have been made had the sellers preferred to lose the two and a half per cent. discount ; therefore, they never can be heard, to set up the possession of the receipts against the purchaser of the goods. They were bound to give them up, in good conscience, and would have been compelled so to do, had a bill in equity been filed against them, and all actions, inconsistent with the equities of the purchasers, would have been staid—or trover might have been maintained for the receipts, at law : therefore, the argument fails entirely, which is founded on the possession of them.

Indeed, numberless reasons occur to show, that no such doctrine can have any foundation as the one on which the Judgment below proceeded. The lighterman

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THOMPSON. may, and generally does, take one receipt for all the goods he delivers, specifying each parcel. Then how can the complete delivery of each person's goods, and their property vesting finally in him, depend on the possession of a document which only one of them can by possibility hold? But the best answer to the position contended for, and the best removal of it from the case, is the obvious consideration, that the taking a receipt is a mere accident, not essential to the transaction between the buyer and seller, however good for binding a third party, the ship owner or his captain and mate ; and no receipt being necessary, no non-delivery of it can affect the proceeding. Suppose the lighterman took no receipt, or, taking it, dropt it into the water, or otherwise lost it, shall it be said that the delivery of the goods is the less complete, when the stipulated price has been paid, or an equivalent for it taken in an acceptance according to the contract?

Does not the taking that acceptance, which was by the contract only to be given by the purchaser on the delivery of the goods, and to be given for each parcel as delivered, at once show that the delivery was completed, that nothing remained to be done, that the goods had reached their journey's end, and that they were no longer *in transitu* to be stopt?

The cases and authorities resorted to, prove really nothing in favour of the Judgment. *Craven v. Ryder* (6 Taunt. 433) differs materially from the present case, in having an order from the sellers to the captain, "to receive the goods for and on account of the Plaintiffs" (the sellers), and in the receipt expressly stating, that they were received for and on account of the sellers ; and it was proved that this form had been recently adopted, for the express purpose of giving the shipper a

command over the goods, until the receipt should be given up for the bill of lading. It is true, *Gibbs*, C. J., says he should have held the same opinion had the receipt been in the old form; yet he says the change is a circumstance to be considered. Nor can we argue that it is otherwise, than an important distinction between that case and this. *Dallas*, J., who tried the cause, said, the jury were clear that the Plaintiff never had parted with the possession; so that he considered the fact of continuing possession as having been left to them. Moreover, there was evidence in the present case that by the custom of the trade, when goods were sold "free on board," the buyer is considered as the shipper, though the seller is to carry them for him to the vessel; and we know not if any such evidence was given in *Craven v. Ryder*. If that Judgment be understood to hold this evidence immaterial, then we are unable to concur with it.

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In *Ruck v. Hatfield* (5 B. & Ald. 632), a receipt was tendered to the mate, who had the command, stating that the goods were shipped on account of the Plaintiff (the seller), but he refused to sign it, and delivered bills of lading; and *Abbott*, Chief Justice, held that the Defendant ought to have signed the receipt so tendered, which would have been an acknowledgment, that the goods were delivered on account of the Plaintiff.

In *Thompson v. Trail* (6 B. & C. 36), there was no mention of the goods being received on account of the Plaintiff; but though this is alleged to have been deemed immaterial, the case in Banc turned entirely on the question whether or not there was evidence of a conversion.

Reliance was placed on a passage in *Abbott* on the Law of Shipping, Part IV. c. 10. (p. 469, 6 Ed.), in

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 THOMPSON. which the cases of *Ruck v. Hatfield* and *Craven v. Ryder* are cited. But in another passage of more distinctness, Part IV. c. 4, (p. 301,) the learned author says, that the master should take care not to sign a bill of lading before he has had the receipt returned, else he may make himself responsible to the shipper and the holder of the receipt. But he goes on to say, how he may make himself responsible, and in what event, in case the shipper has a legal right to have the goods delivered to his own order.

The question in all the cases between buyer and seller, which is the case here, is, whether, or not, anything remained to be done as between these two parties. The importance of keeping that in view and always attending to this, whether the question arises between these two parties or between one of them, the seller, and some third party, is well stated by *Le Blanc J.*, in *Busk v. Davis* (2 M. & S. 403), and *Whitehouse v. Frost* (12 East. 621). In the present case, it is quite clear, that nothing whatever remained to be done, between the buyer and seller, unless it be that the former ought most certainly to have delivered up the mate's receipt, which he wrongfully, or by oversight, kept possession of, without the shadow of a right to it; and whether it be wrong or error, he is not the party to take advantage of this.

The Judgment below must be reversed. The costs below, if any have been paid by the Defendant (Appellant), must be returned to him, and the Plaintiff (Respondent), must pay the costs of the suit below.

ARCHIBALD	FRANCIS	ARBUTHNOT,	} <i>Appellants,</i>
GEORGE	ARBUTHNOT,	WILLIAM	
M'TAGGART	and	ALEXANDER MAC-	
KENZIE	-	-	
-	-	-	

AND

JOHN BRUCE NORTON - - - - *Respondent.**

*On Appeal from the Supreme Court of Judicature at
Madras.*

Public policy—Sum directed to be paid by statute to legal representative of Judge dying in office—Assignment of—Legality—If opposed to public policy.

An assignment by a Puisne Judge of the Supreme Court at *Madras*, of the sum “equal to the amount of six months’ salary,” directed by the 6 *Geo. IV.*, c. 85, to be paid to the “legal personal representatives” of such Judge, in case he shall die, in and after six months’ possession of office, is a valid assignment, being a vested contingent interest in such Judge: and not being payable during the lifetime of the Judge, is not an assignment of salary, within the 5 & 6 *Edw. III.*, c. 16, and 49 *Geo. III.*, c. 126, and, therefore, contrary to public policy.

THE question in this case was the validity of an assignment, made to the Appellants, by the late Sir *John David Norton*, a Puisne Judge of the Supreme Court of Judicature at *Madras*, of the sum of R. 25,000 (£2,500), which, by virtue of the Act, 6 *Geo. IV.*, c. 85, was payable to his legal personal representatives, in the event of his death, while in possession of the office of Judge.

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By the Act of Parliament, 6 *Geo. IV.*, c. 85, intituled, “An Act for further regulating the Payment

* Present: Members of the *Judicial Committee*,—The Lord President (the Duke of Buccleugh), the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan.

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 ARBUTHNOT *of Salaries and Pensions to the Judges of His Majesty's*
 v. *Courts in India,*” and which in its preamble recites,
 NORTON. “That it was deemed expedient to make further pro-
 vision for all such Judges, so as that the acceptance of
 their respective offices should not be the occasion of
 actual loss to their representatives, in the event of the
 death of any such Judges taking place after their
 arrival in *India,*” it is, by the 5th section, enacted,
 “That when and as often as it shall happen that any
 such Judge should depart this life, while in possession
 of such office, and after the expiration of six calendar
 months from the time of his arrival in *India,* for the
 purpose of taking upon him the office of Judge, then
 and in such case the Court of Directors of the East
 India Company shall, and they are thereby required to
 pay, or direct and cause to be paid, out of the territo-
 rial revenues from which the salary of such Judge so
 dying should be payable, to the legal personal repre-
 sentatives of such Judge so dying as aforesaid, over
 and above what might have been due to such Judge at
 the time of his death, a sum equal to the amount of
 six calendar months’ salary of the office of such
 Judge.”

On the 23rd of *October* 1841, Sir *John Norton*
 was appointed a Puisne Judge of the Supreme Court
 of Judicature at *Madras*, where he arrived in *April*
 1842, and entered upon his judicial duties, and died on
 the 24th of *September* 1843, while in the possession
 of his office, leaving the Respondent his executor and
 legal personal representative.

Upon the death of Sir *John Norton*, a sum of
 money, equal to one half year’s salary (R. 25,000),
 became, in accordance with the terms of the before-
 mentioned Act of Parliament, payable to his legal

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personal representatives, which sum the Respondent, as such legal personal representative, received.

Previous to the month of *August* 1842, Sir *John Norton* had obtained certain pecuniary advances from the Appellants, who are merchants and agents at *Madras*; to secure the repayment of which, he made an assignment to them of a policy of insurance, effected on his life for £2,500; and subsequently becoming further indebted to the Appellants, he, upon their demand for additional security, addressed a letter to them, dated the 20th of *August* 1842, which was as follows:—

“Gentlemen,—I acknowledge to have received from you a second bill on Messrs. *Coutts* and Co., in favour of *Felix Pryer*, Esq. Now, for the repayment to you of the monies payable in respect of such bill, I pledge and make liable, not only the policy of insurance in your hands, and the other property made liable to you for previous advances; I further make liable for all such advances, including the monies in respect of the aforesaid bill of exchange, and do agree to assign, and do assign to you the sum of £2,500, payable to my personal representatives, in case I should die in possession of my office of one of the Judges of the Supreme Court; and do agree that this sum shall be received by, and be payable to you, as a further security for all such advances, and any balance I may owe to you.”

At the time of the decease of Sir *John Norton*, a balance was due to the Appellants, amounting to the sum of Rs. 51,421. 13a. 8p.; and they claimed to be entitled to receive in part discharge of that balance, the sum of money which the Respondent had received in respect of the allowance directed to be made by the

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ARBUTHNOT v. NORTON. Statute before-mentioned, to the “legal personal representatives” of a deceased Judge in *India*.

On the 3rd of *April* 1844, the Appellants exhibited their Bill of Complaint on the Equity side of the Supreme Court of Judicature at *Madras*, against the Respondent, stating the facts and circumstances above set forth, and further stating that, under the aforesaid assignment of the 20th of *August* 1842, they, the Appellants, were entitled to have the said sum of Rs. 25,000 applied towards the payment and discharge, so far as the same would extend, of the balance of Rs. 51,421. 13s. 8p., due by the said Sir *John Norton* to them, the Appellants, as aforesaid, and praying that the said assignment, bearing date the 20th of *August* 1842, might be declared to be a good and valid assignment to the Appellants, of the monies payable under and by virtue of the said Act of Parliament as aforesaid; and that the Respondent might be decreed to be a trustee for the Appellants of the said sum of Rs. 25,000, so received by him under such Act, and that if the Respondent did not admit the correctness of the account so sent to him by the Appellants on the 2nd of *November* 1843, as aforesaid, then that an account might be taken of what was due and owing to the Appellants for and on account of the said Sir *John Norton*, deceased, and that an account might be taken of all sums of money received or to be received by the Appellants for and on account of the said policy of insurance, the Appellants offering to give credit for the same when the same should be received by them or their agents, and that the balance due to the Appellants after such receipts might be ascertained, and that the Respondent might be decreed to pay to the Appellants the said sum of Rs. 25,000,

so far as the same would extend, in discharge of such balance.

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The Respondent by his answer admitted all the facts and circumstances hereinbefore stated ; but submitted, as a matter of law for the judgment of the Court, whether or not the letter of the 20th of *August* 1842, was a valid and effectual assignment of the sum in question ; and he insisted that such sum was not assignable or disposable by Sir *John Norton* as part of his estate.

The cause came on to be heard on bill and answer, on the 29th and 31st of *July* 1844, before the Supreme Court at *Madras*, and on the 12th of *September* 1844, judgment was pronounced by Sir *Edward Gambier*, Chief Justice, when the Court ordered and decreed that the Bill of Complaint of the Appellants should be dismissed without costs.

From this Decree, the Appellants brought the present Appeal.

Mr. *Kindersley*, Q. C., and Mr. *H. Prendergast*,
for the Appellants.

Under the 6th *Geo.* IV., c. 85, Sir *John Norton*, having been six months in the possession of his office of Puisne Judge, acquired a right to have the sum of 25,000 rupees paid to his legal personal representatives, in the event of his dying while in such possession ; he had, therefore, such an interest as was assignable in equity. The letter of the 20th of *August* 1842, constitutes a valid and effectual assignment of such interest. The question turns upon the words, legal personal representatives.—[The Vice-Chancellor *Knight Bruce*: The word personal is not to be found in

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the Statute of Distributions. I do not think there is any case in which the words, legal personal representatives, have been held to be next of kin.]—The cases in which Courts of Equity have decided that the words legal or personal representatives meant next of kin, have always been either upon the construction of a Will or a Deed, where it was evidently the intention of the testator or the parties to the Deed, to exclude executors or administrators. *Bridge v. Abbott* (a). *Palin v. Hills* (b). *Evans v. Charles* (c). *Bulmer v. Jay* (d). Here the question arises upon the words of the Act of Parliament, where the legal effect must be given to the words “legal personal representatives,” this must mean executors or administrators. The intention of the Legislature is clear. A sum of money, equal to half a year’s salary, is to be paid, to the legal personal representatives of a Judge dying in office—that can only mean the persons who shall represent his estate. The Court below proceeded on the assumption that Sir *John Norton* had no vested interest in this sum, and could not, therefore, assign it; but if the words of the Act of Parliament mean any thing, they make it part of his personal estate, and he had a right to select to whom it might go—he could choose his own executors. How can it be said that, if undisposed of, this sum would not form assets in the hands of his executors, and, as such, liable to the claims of creditors? If that is so, what is there to prevent him prospectively charging it by deed *inter vivos*? Many cases might be put, of property which could not, by any possibility, fall into possession in the party’s life-

(a) 3 Bro. C. C. 224.

(b) 1 Myl. & K. 470.

(c) 1 Anst. 128.

(d) 4 Sim. 48.

time, and yet it is assignable, such as a *post obit* bond, payable at the party's death.

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Then it is said, that the assignment of such an interest is contrary to the policy of law, and within the meaning of 5 & 6 *Edw.* III., c. 16, which was extended to *India* by 49 *Geo.* III., c. 126. This is not an assignment of salary ; for the Act expressly calls it “a sum equal to half a year's salary.” It is true that the law will not allow the emoluments of an office to be aliened, where the separation of those emoluments, from the office to which they are annexed, would be inconsistent with public policy. It will not admit the enjoyment of the emoluments to be in one person while the office remains in another. In the case of military half-pay, it is not merely a reward, but a retainer for future services ; but here, when this sum becomes payable, the party must be dead.—[The Vice-Chancellor *Knight Bruce*: Have not the public an interest in seeing that a person holding the high office of a Judge, should not die in such circumstances, as that there should not be assets sufficient to defray the expenses of his funeral?]—In *Davis v. The Duke of Marlborough* (a), it was laid down by Lord *Eldon*, that a pension for past services might be alienated. Where there is no cure of souls, the profits of a Canonry may be assigned. *Greenfell v. The Dean and Canons of Windsor* (b). In the same way it has been held, that half-pay is not assignable, future services being contemplated. *McCarthy v. Goold* (c). *Gibson v. The East India Company* (d). *Stone v. Lidderdale* (e). But in none of these cases has it ever been held that a pension

(a) 1 Swan. 79.

(b) 2 Beav. 544.

(c) 1 B. & B. 387.

(d) 5 Bing. N. C. 262.

(e) 2 Anst. 533.

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 ARBUTHNOT *v.* NORTON. given in remuneration of past services, and not for the purpose of keeping the party in a situation for future services, was not capable of being assigned.

Mr. *Chilton*, Q. C., and Mr. *Jenkins*, for the Respondent.

First. Upon the true construction of the 6th *Geo.* IV., c. 85, no interest in the fund thereby expressly directed to be paid to the "legal personal representatives" of a deceased Judge, vested in Sir *John Norton*, so as to enable him to assign or transfer the fund ; on the contrary, the fund in question, being intended by the Legislature as a gift or gratuity, to arise and be payable only upon the decease of the Judge while in office, in order that the acceptance of office should not occasion loss to his personal representatives. We do not dispute that, where the term legal personal representative occurs in the Act of Parliament, it means executor or administrator, for the same hand is to receive it that is to receive the other part of his personal estate ; but it is also clear, from the preamble, that the meaning of the Legislature was, that the next of kin of any Judge dying in office, are the persons who would be entitled, according to the Statute of Distributions. *Cotton v. Cotton* (a). *Robinson v. Smith* (b). *Styth v. Monro* (c). *Baines v. Ottey* (d). And we submit that, from the preamble of the Act, it is to be inferred that the Legislature intended to make some provision for the family of the Judge dying in office, to enable them to return home. If the Legislature had intended to give this benefit to the party

(a) 2 Beav. 67.

(c) *Ib.* 59.

(b) 6 Sim. 47.

(d) 1 Myl. & K. 465.

himself, irrespective of his family, why should not the Act have made the half year's salary payable in advance? But no; the party himself can never, by any possibility, become possessed of this sum. It is nothing but a bare possibility, and not coupled with any interest, and is, therefore, not assignable at law. *Jones v. Roe* (a). 1846.
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Secondly. It is against public policy to allow this sum to be assigned. The distinction attempted to be made between a pension for past services, without reference to future employment, and that with reference to future employment, is untenable. The assignment is, therefore, void, as against public policy. *Lidderdale v. The Duke of Montrose* (b). *Davis v. The Duke of Marlborough*.

Mr. *Kindersley*, in reply.

The principle upon which Courts have held pensions and salaries of public officers inalienable, is, either that they are given to keep up the dignity of the office, or to ensure a due discharge of its duties. And it has been held in either case, that it is against public policy to assign such a salary. But the question here is, what is this half year's salary. It is obvious that it is given to prevent loss to the personal estate of the party, by his going out of this country to take office in *India*. Then, if it is to be considered as personal estate, and subject to debts, why may not the party himself pay a particular creditor in preference to the others?

(a) 3 Term Rep. 88; and see note to *Purefoy v. Rogers*. 2 Saund. Rep. 388 n. Ed. 1845. See also *Prosser v. Edmonds*, 1 Y. & Col. 481.

(b) 4 Term Rep. 248.

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The Right Hon. Dr. LUSHINGTON:

The question in this case arises between Messrs. ^{10th F.} ^{1846.} Arbuthnot & Co., who are merchants and bankers carrying on business at *Madras*, and Mr. *John Bruce Norton*, who is the son and executor of the late Sir *John David Norton*, who was one of the Puisne Judges of the Supreme Court of *Madras*; and it relates to a sum of £2,500, which is payable by virtue of the Statute 6th of *Geo. IV.*, cap 85, and which is granted in the following manner (so far as relates to this question): “that when and so often as it shall thereafter happen, that any Puisne Judge of the Supreme Court of Judicature at *Madras*, shall depart this life, while in possession of the said office, and after the expiration of six calendar months from the time of his arrival in *India*, for the purpose of taking upon him the office of Puisne Judge, then, and in all and every of such cases, the Court of Directors shall, and they are thereby required to pay or direct, and cause to be paid out of the territorial revenues, from which the salary of such Puisne Judge, so dying, should be payable, to the legal personal representatives of such Puisne Judge, so dying, as aforesaid, over and above what may have been due to such Puisne Judge at the time of his death, a sum equal to the amount of six calendar months’ salary of the office of Puisne Judge.”

The sum on the present occasion, that is equal to the amount of six months’ salary, is £2,500, and the claim of the Appellants is limited to that sum; and the question is, whether, under the circumstances, they are entitled to it, within the provisions of this Act?

Now it appears that some time anterior to the death of the late Sir *John Norton*, he, for a good and valuable consideration, purported to make an equitable

assignment of all his right and interest in this £2,500, ^{1846.}
 to Messrs. *Arbuthnot*, in consideration of monies re- ARBUTHNOT
 ceived from them ; and the first question is, whether ^{v.} NORTON.
Sir John Norton had the power of making such an
 assignment, or whether, by virtue of this Act of Parlia-
 ment, this fund was destined to go to some other
 persons, or in some other direction.

With regard to this sum of £2,500, their Lordships
 are all of opinion, that the intention of the legis-
 lature was to provide against a contingency, which
 had arisen in two or three antecedent instances, and
 which contingency, in cases to come, is specifically pro-
 vided for by this Act of Parliament, viz. that a person
 taking upon himself the office of a Judge in *India*, and
 dying in the possession of the office, having been put
 to great expenses at the time of making his outfit from
 this country to *India*, might have some certain means
 whereby his estate would be enabled to be reimbursed
 that loss, in case of his death whilst in office.

Their Lordships think, that any construction of
 this Statute, which would appropriate this fund in
 any other way, would be against the whole intention of
 the legislature. Without saying what might be the
 meaning of the words which I have read, especially the
 words “legal personal representative,” in any other
 case, and without reference to any other context
 or construction, the only question here is, what is
 the meaning of those words in this Act of Parliament ;
 and we are all of opinion that they mean the executor
 or administrator of the Judge deceased, and that the
 money is to be taken as part of his general assets, and
 to be administered as such.

That being so, the second question is, whether it

1846. was in the power of Sir *John Norton* to assign this
 ARBUTHNOT sum of money.

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No question has been raised at all, that if it was in his power, the letter, which forms part of these proceedings, is sufficient to constitute an equitable assignment.

Now we consider the £2,500 to have been part of his estate, precisely in the same light, and precisely of the same description, as if it had been a policy of assurance upon his life ; that is to say, a certain sum of money to which he would be entitled upon the contingency of a certain event ; over which he had complete power of disposition by assignment in his lifetime, or by testamentary disposition, if he thought fit to exercise the power in that way.

With regard to the last question, which is a question certainly which their Lordships have thought deserving of greater attention and consideration than either of the preceding points that were discussed at the bar ; viz. whether this assignment is against public policy or not,—we have come to the conclusion that it is not against public policy.

In giving this opinion, we do not in the slightest degree controvert any of the doctrines, whereupon the decisions have been founded, against the assignment of salaries by persons filling public offices: on the contrary, we acknowledge the soundness of the principles which govern those cases, but we think that this case does not fall within any of these principles ; and we think so because this is not a sum of money which at any time during the lifetime of Sir *John Norton*, could possibly have been appropriated to his use, or for his benefit, for the purpose of sustaining with

decorum and propriety the high rank in life, in which he was placed in *India*. We do not see any of the evils, which are generally supposed would result from the assignment of this sum, inasmuch as during his lifetime his personal means would in no respect whatever have been diminished, but remain exactly in the same state as they were. It is for these reasons, that their Lordships are of opinion, that the Judgment of the Court below was erroneous, and that we are under the necessity of reversing that Judgment ; but being all of opinion, that this was a case which it was necessary for an executor to have the judgment of a Court upon, we think under the special circumstances, that the costs on both sides, both here and in *India*, should be paid out of the fund.

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JOHN COWIE and Others - - - - - *Appellants,*

AND

WILLIAM REMFRY and Others - - - *Respondents.**

On Appeal from the Supreme Court of Judicature at Calcutta.

Contract—Construction—Bought and sold notes—Contract by—Material variation of sold note—Effect—Contract, if binding—Mercantile usage—Presumption of.

C. & Co. and H. & Co. were merchants at Calcutta. H. & Co. sold to C. & Co. a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to H. & Co., and submitted it to H. for his approval, when H. having objected to a particular word remaining, the broker took the sold note to C., and informed him of H.'s objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. & Co. The broker delivered to C. & Co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by H. & Co. against C. & Co. for non-performance of the contract contained in the sold note, the Supreme Court at Calcutta was of opinion, that the sold note alone formed the contract, and found for the Plaintiffs. Upon appeal, held by the Judicial Committee, reversing such finding, that the transaction was one of bought and sold notes, and that the circumstances attending C.'s alteration of the sold note and affixing his initials, were not sufficient to make that note, alone, a binding contract; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract.

10th & 11th
Feb. 1846.

THIS was an action brought in the Supreme Court at Calcutta, to recover damages for the non-perform-

* Present: Members of the *Judicial Committee*,—The Lord President, (the Duke of Buccleugh), Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan.

ance of a contract by which the Appellants (the Defendants) engaged to purchase of the Respondents (the Plaintiffs) a certain quantity of indigo.

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The Appellants and Respondents both constituted mercantile houses at *Calcutta*.

The contract was made through the instrumentality of a broker of the name of *Holmes*, who then carried on business in partnership at *Calcutta*.

The breach of the contract consisted in the Appellants' refusal to receive and pay for 147 chests of indigo, being part of a much larger parcel delivered to the Appellants by the Respondents, and which the Appellants afterwards returned, and refused to receive or pay for, upon the ground that by the specific terms of the contract, they were authorised to reject these 147 chests, on account of the inferior quality of the indigo contained in them. The entire parcel consisted of 1,166 chests.

The declaration stated, that the Defendants and one *William Ainslie*, who was then without the jurisdiction of the Supreme Court, bargained for and bought of the Plaintiffs and *Robert John Dring* in his lifetime, and the Plaintiffs and *Dring* sold to the Defendants and *Ainslie*, a large quantity of indigo, being the whole produce of the season's indigo of two factories and six-sixteenths of the produce of the season's indigo of another factory, at the rate or price of 205 Company's rupees per factory *maund* for each and every *maund* thereof, free of brokerage, with the usual allowance on rejections, viz. on broken, dusts, washings, and on stuff inferior to the run of the parcels; delivery to be taken as the indigo should arrive, and to be paid for by the Defendants and

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Ainslie to the Plaintiffs and *Dring* on delivery thereof ; and that the Plaintiffs and *Dring* should have the option of giving the rejections at the price they might be valued at by one Mr. *A. Lacroix*, or to withdraw them ; and that in consideration that the Plaintiffs and *Dring* would deliver the said indigo, Defendants and *Ainslie* promised the Plaintiffs and *Dring*, to take delivery of and accept the said indigo, and pay them for the same on delivery. It then averred that the produce of the two factories and six-sixteenths of the third factory amounted to 4,361 *maunds* and 11 *chittahs*, and that Plaintiffs and *Dring* were ready and willing to deliver, and tendered and offered to deliver, to the Defendants and *Ainslie* the said indigo as it arrived, and requested the Defendants and *Ainslie* to take delivery of, and accept and pay for, the same, and that Defendants and *Ainslie* accepted and paid for part of the said indigo ; and assigned for breach, that they would not accept or pay for the residue, and alleged special damage.

To this declaration the Defendants pleaded three pleas:—First, that they did not promise as alleged ; Secondly, that Plaintiffs and *Dring* did not tender and offer to deliver the residue of the indigo to the Defendants and *Ainslie* as alleged ; Thirdly, that the said residue consisted of broken, dust, washings, and stuff, inferior to the run of the parcels, and that Defendants and *Ainslie*, in pursuance of, and according to, the terms of the contract, rejected the said residue. That the residue so rejected was afterwards valued by the said *Lacroix* at the price of 154 Company's rupees per factory *maund* ; that the Defendants and *Ainslie* were always ready and willing to accept and pay for

such residue, according to the valuation of *Lacroix*, of which the Plaintiffs and *Dring* had notice; but that the Plaintiffs and *Dring* would not deliver the residue at that price or valuation, but withdrew the same.

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The Plaintiffs took issue on all these pleas, and thereupon issue was joined.

On the 1st of *July* 1842, and before the trial of these issues, a commission to examine witnesses in *London*, on behalf of the Plaintiffs, and of the Defendants, was obtained.

Upon the return of the evidence taken under the commission, the cause came on for trial, before Sir *Lawrence Peel*, Chief Justice, and Sir *John Peter Grant* and Sir *Henry Wilmot Seton*, Justices of the Supreme Court, on the 22nd and 23rd of *November* 1843.

It was proved, on behalf of the Plaintiffs, that Messrs. *Whyte, Holmes and Co.* were brokers at *Calcutta*, and that that firm was employed by both Plaintiffs and Defendants, in negotiating the sale and purchase of the indigo, in the declaration mentioned; and in order to establish the contract declared upon, the Plaintiffs put in evidence the following letter written by *Holmes*, one of the partners in the firm of *Whyte, Holmes and Co.*, dated the 19th *November* 1840, addressed to the Plaintiffs, and purporting to be the sold note of the indigo in question:—

“ *Calcutta*, 19th *Nov.* 1840.

“ Messrs. *Hamilton and Co.*

“ Dear Sirs,—We have this day sold for you to Messrs. *Colvin, Ainslie, Cowie and Co.*, the whole

produce of this season's indigo of the Big and Little Union, in *Kishnagur*, and 6-16ths of the *Mulnauth* factory, on the following terms, viz. :—

Price.....Two hundred and five Co.'s rupees,
per factory *maund*, free of bro-
kerage, with the usual allow-
ance on rejections, viz. on
broken, dust, washings, and on
stuff inferior to the usual run of
the parcel.

“We remain, dear Sirs, yours faithfully,
“Whyte, Holmes and Co., Brokers.”

The Defendants objected to this letter being received as evidence of the contract, on the ground, that it was

not in itself a contract: that it was in its form a sold note, forming part only of a contract, and that to make it a contract, a corresponding bought note ought to be produced. That further, as a contract it was imperfect and not binding, under the Statute of Frauds, for want of the signature of the Defendants. The Supreme Court, however, received it as evidence, and gave leave to the Defendants to move for a non-suit.

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It was proved by the Defendants, as part of their case, that on the 20th of *November* 1840, Messrs. *Whyte, Holmes* and Co. wrote, and sent to the Defendants, a letter of corresponding date with the sold note, and purporting to be the bought note of the indigo mentioned, which was as follows:—

“*Calcutta*, 19th *Novr.* 1840.

“Messrs. *Colvin, Ainslie, Cowie* & Co.

“Dear sirs,—We have this day purchased on your a/c from Messrs. *Hamilton* & Co. about 4,500 *maunds* of indigo, being the present season's produce of the Big & Little Union in *Kishnagur*, & 6-16^{ths} of the *Mulnauth* concern, on the followg terms, viz.

Price, Co.'s Rs. 205 per F. M^d. & 1% brokge from you, rejecting broken, dust, washings, & any thing that is inferior to the run of the parcels.

Delivery, To be taken as it arrives, & to be paid for on being delivered.

“Mr. *Lacroix* of our establishment is to examine the indigo, & state any that he considers to be inferior, & also to value it, & the other rejections, Messrs. *Hamilton* & Co. reserving for themselves the option of giving the rejections or not, as they may choose.

“We remain, dear sirs, yrs faithfy,

“*Whyte, Holmes* & Co.”

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It was further proved, that the deliveries of indigo under the contract made by *Whyte, Holmes and Co.* commenced on the 30th *November* 1840, and ended on the 14th *January* 1841, and consisted of 1,151 chests, or 4,361 factory *maunds*, and 11 *chittacks*, and that the whole of them were inspected and approved or rejected by *Lacroix*, the person named in the bought and sold notes, who attended all the deliveries, and made his rejections mostly in the presence of a Mr. *Savi*, one of the manufacturers of a large portion of the indigo, and that *Lacroix* valued all the rejected chests, which were afterwards accepted by the Defendants. That in the month of *December* 1840, the Defendants shipped for *London* 1,012 of the chests of indigo so bought by them of the Plaintiffs, and paid for as aforesaid, and afterwards sold the same by auction at the indigo sales in *London* in *July* 1841. That in *March* 1841, the Plaintiffs applied to Defendants, through Messrs. *Whyte, Holmes and Co.*, to obtain the Defendants' consent to have the rejected chests of indigo, then in the bonded warehouse, sold by public auction, but the Defendants declined to interfere. That in *May* 1841, the Plaintiffs obtained from the bonded warehouse at *Calcutta* 147 chests of indigo, which included the whole number of chests rejected by the Defendants, and 10 chests beyond. That in *June* 1841, the Plaintiffs, by Messrs. *Holmes, Faudon and Co.*, their brokers, sold the whole of the 147 chests received by them from the bonded warehouse, by public auction in *Calcutta*, at prices considerably less than the valuation of chests rejected by *Lacroix*, for being inferior, and which the Plaintiffs delivered at such valuation, without observation or objection. That between the 29th of *November* 1841, and 2nd of

February 1842, 64 chests of the indigo rejected by the Defendants, and part of the 132 chests which had been deposited in the bonded warehouse in *Calcutta* by the Defendants, and sold by auction in *Calcutta* by the Plaintiffs in *June* 1841, as aforesaid, arrived in *London*, and were put up for sale by auction in *London* in *April* 1842, and 57 of the said chests were then sold, at prices averaging one-third less than the sale price of the 1,012 chests. That the 64 chests so sold in *April* 1842, were compared and examined with the 1,012 chests of indigo sold in *July* 1841, the rejected chests were contrasted with the accepted chests of the corresponding marks and parcels, and the 1,012 were found to be of very superior quality, and the 64 chests were found to be very far inferior to the general run of the 1,012 chests and to the accepted chests of the corresponding marks, and 57 of the said chests were then sold, at prices averaging one-third less than the sale price of the 1,012 chests.

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The evidence given respecting the custom of merchants at *Calcutta* to deliver bought and sold notes, was conflicting; but the Court, upon the evidence in general, found a verdict for the Plaintiffs, for the difference of amount between the contract price of the indigo, and that at which the Plaintiffs sold the 132 chests, through Messrs. *Holmes, Faudon* and Co. in *June* 1841, and directed that the amount should be calculated by the prothonotary. The prothonotary calculated the amount of the damages, and assessed them at Rs. 26,035. 5. 11.

Upon the 26th of *January* 1844, the Defendants obtained from the Supreme Court, a rule to show cause why a judgment of nonsuit should not be entered, or why a verdict should not be entered for the Defen-

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dants, or why a new trial should not be had, on the grounds, that the contract declared upon was not duly signed according to the Statute of Frauds, and that there was no written contract, and that the verdict was against evidence, or the weight of evidence.

The Plaintiffs showed cause against the rule, and the Court took time to consider their judgment, and on the 5th *March* 1844, Sir *Lawrence Peel* delivered judgment, that the Defendant's rule of the 26th of *January* 1844, should be discharged, with costs. This judgment proceeded on the ground that the sold note, put in by the Plaintiffs, alone evidenced the contract between the parties ; and that the Plaintiffs, having proved the contract declared on, and the delivery of the whole quantity contracted for, it lay upon the Defendants to show, that they had rightly exercised their power of rejection, which the Court, upon the evidence in the cause, was not satisfied of, and was, therefore, of opinion that the Defendants were bound to pay the contract price for the indigo rejected.

From this verdict and judgment of the Supreme Court, the present Appeal was brought.

The Solicitor-General (Sir *F. Kelly*), Mr. *Hill*, Q. C., and Sir *John Bayley*, for the Appellants.

This was a contract by bought and sold notes, according to the usual mode of mercantile transactions at *Calcutta*; and it cannot be disputed that, if there be any variation in any material part, between the bought and sold notes, the contract is void and gone. *Thornton v. Mieux* (a). *Thornton v. Kempster* (b).

(a) 1 Moody & Malkin, 43.

(b) 5 Taunt. 786.

Pitts v. Beckett (a). *Short v. Spackman* (b). *Hawes v. Foster* (c). *Smith's Mercantile Law*, 3 Edit. p. 455. There must be mutuality of contract. The sold note is a document which expresses only a sale ; it cannot, therefore, even though signed by the intended buyer and seller, amount in law to a contract of sale and purchase, so as to satisfy the Statute of Frauds (29 *Car.* II., cap. 3, sec. 17), the contract required by that Act being a mutual agreement, binding on, and enforceable against, both parties, which a sold note is not. In this case, the sold note differs in many particulars from the bought note. But assuming the contract to be contained in the sold note alone, the note proved by the Plaintiffs was altered in a material particular, after it had been signed by the brokers, and was not, subsequent to such alteration, signed by the Respondents or any agent lawfully authorised on their behalf. The insertion of the initials H. C. above the erasure of the word "usual" in the note was not intended to operate, and could not operate, further than as an authentication of the erasure: it did not in law amount to a signature sufficient to bind the Appellants to the performance of the contract, so as to satisfy the Statute of Frauds. *Eastwood v. Kenyon* (d). *Allen v. Bennett* (e). *Stokes v. Moore* (f). The Court below thought that this case fell within the principle of *Rowe v. Osborne* (g), but we submit that the present is wholly different from that case. In that case there were none of the incidents of a bought note, in the mercantile acceptance of the term ; the contract was

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(a) 13 Mee. & W. 743.

(b) 2 Barn. & Adol. 962.

(c) 1 Moody & Rob. 368.

(d) 11 Add. & Ell. 438.

(e) 3 Taunt. 109.

(f) 1 Cox, 219.

(g) 1 Stark. *Nisi Prius* Cases, 140.

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not effected through the medium of bought and sold notes, nor was it signed by the broker, but by the party himself ; and Lord *Ellenborough* was of opinion that that was the real contract, and not the note of such contract, which was sent by the broker to the Defendant, and which varied from the contract itself. —[Lord *Brougham*: In *Hawes v. Foster* (a), the jury were desired to say, whether it was a bought and sold note ; so here we are a jury as much as the Judges in the Supreme Court were.]—It cannot be contended that, at the time the broker went to *Cowie*, and he struck out the word “usual,” the transaction was complete ; and that the necessity of a bought note was dispensed with, by *Cowie* agreeing to the alteration. Suppose a draft release brought to one of the parties to have an alteration agreed to, his signing that alteration is not the formation of a contract. The mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement for a lease, will not constitute a signature within the meaning of the Statute of Frauds. *Stokes v. Moore*. This must be considered as a transaction effected by a broker between other parties, by means of bought and sold notes ; and the effect of the bought note varying materially from the sold note, is to render the contract void. Nothing has been done to waive the effect of such variation.

Sir *Thomas Wilde*, and Mr. *Charles Buller*, for the Respondents.

The question is, whether this sold note, containing all the terms of the contract of the parties, is within the meaning of the Statute of Frauds. The bought note

(a) 1 Moody & Rob. 368.

was not necessary—the transaction was complete without it.—[Lord *Brougham*: The question is, whether this is a transaction of bought and sold notes. If it is so, the law is clear. *Rowe v. Osborne* was not a case of bought and sold notes.]—This note was signed by the party sought to be bound. There is no doubt whatever that *Whyte, Holmes and Co.* had authority to enter into the contract. *Holmes* tendered the note which contained the contract to *Woollaston* for his approbation, but upon his dissenting to the word “usual” remaining, he took it to *Cowie*; and the effect of his conversation with him was, that he agreed to it, with the word “usual” struck out of it. *Cowie* drew his pen through the word, put his initials over it, and handed it back to *Holmes* to be delivered to the seller. We have, therefore, a paper containing the terms of the contract, signed by the party authorised by the buyer, and delivered to the seller, with the approbation of the buyer. This was the signature of the purchaser for all legal purposes (before the delivery of the bought note); if it was not so, at the delivery, it never could be afterwards made a contract within the Statute of Frauds. The bought note was not the means of completing the transaction; it was not the means by which the fact of buying was known to the buyer: it was not delivered at the time. All the evidence goes to prove the contract complete without the bought note, and it not being the general custom at *Calcutta*, to complete mercantile transactions by bought and sold notes, there was no occasion for the bought note here, and the contract was a binding contract without it.

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The Solicitor-General, in reply.

This is undoubtedly a case of bought and sold notes;

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REMFRY. the broker himself states that he delivered both a bought and a sold note. The contract, in such cases, is not binding upon either party until both are delivered. *Thornton v. Kempster* (a).—[The Right Hon. Dr. *Lushington* referred to *Humphries v. Carvalha* (b).]—That case is in our favour ; it goes to show that the notes must correspond at the time that the contract is complete.—[The Right Hon. Dr. *Lushington*: There was parol evidence, that the seller acquiesced in the sale.]—There was no variation of the contract on the bought and sold notes. That case only shows that the authority might be disputed ; the question was, whether the seller might reject it on other grounds than discrepancy.

19th August
1846.

The Right Hon. Dr. LUSHINGTON :

The Appellants and the Respondents were two mercantile firms at *Calcutta*. The Appellants were the purchasers of a large quantity of indigo from the Respondents, who brought an action against them, for damages for non-performance of a contract, dated the 19th of *November* 1840.

The Supreme Court was of opinion that the contract was solely constituted by a note, signed by Messrs. *Whyte, Holmes and Co.*, the brokers employed by both parties, that note being dated the 19th of *November* 1840.

The Court being of opinion, that there had been a breach of this contract, gave damages, assessed in pursuance of the contract, to the Respondents, the Plaintiffs. The Appellants, the Defendants, contended that this sold note did not alone constitute the contract, but that the contract consisted of the sold note,

(a) 5 Taunt. 786. 1 Marsh. 355.

(b) 16 East. 45.

and **also** of the bought note, bearing the same date, and **signed** by the brokers.

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The Defendants also insisted, at the trial, that the Plaintiffs were bound to give in evidence the bought note as well as the sold note. The Court, however, was of a contrary opinion, and the Defendants produced the bought note as part of their evidence.

A question arose, as to whether it was customary, in *Calcutta*, to deliver bought and sold notes, and the Court declared, in its Judgment, that the evidence in favour of the custom preponderated.

The questions for us to decide, are, what document, or documents, constitutes the contract between the parties ; next, what is the construction of the contract ; and, lastly, whether the contract was void, or has been broken.

The facts of the transaction must be taken from the evidence of Mr. *Holmes* (a partner in the brokers' firm), who was living in *London*, and examined under a commission. He states, that his firm acted as brokers ; that he communicated, as to the purchase, with Mr. *Henry Cowie*, one of the firm of the Defendants ; that he wrote the sold note addressed to the Respondents ; that Mr. *Woollaston*, one of the Respondents, objected to the word "usual,"—the word "usual" occurring in this manner: "Two hundred and five Company's rupees per factory *maund*, free of brokerage, with the usual allowance on rejections, viz., on broken, dust, washings, and on stuff inferior to the usual run of the parcel:" the objection taken was to the word "usual." He says, that he stated this objection to Mr. *Cowie*, who, he thinks, read the letter, struck through the word "usual," and put his initials, "H. C." over. Mr. *Holmes* adds, that he delivered this note, so

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altered, to Mr. *Woollaston*, to bind the sale, as a contract between the parties.

Mr. *Holmes*, on his cross examination, states, that there was a bought note as well as a sold note. He says he delivered the bought note to the Defendants, for the purpose of their advising their friends of the purchase ; he did not deliver it as a contract, but, subsequently to the day of the contract, for the purpose aforesaid. He says it was not then customary, at *Calcutta*, to deliver a bought note to the purchaser, or a note to the seller.

Mr. *Ferguson*, however, a witness of much greater experience, and whose opinion was adopted by the Court, sitting as a jury, says, he considered it "the invariable custom, at *Calcutta*, to deliver bought and sold notes: it was so in 1840, and it is so now."

Then, upon the whole of this evidence, we must determine what is the legal conclusion, as to the way in which it was the intention of the parties that the contract should be made, and whether any and what contract was made. According to the custom prevailing amongst merchants at *Calcutta*, the contract should have been by bought and sold notes, and the necessary inference is, that the parties intended to contract according to this custom: but this is not all; there is delivered to both parties a bought and sold note, according to such custom. The actual dealing corresponds with the usual practice. What is to be set off against this? nothing but the statement of Mr. *Holmes*, evidently a young and inexperienced person, who deposes that he did not believe such a custom to exist, though, at the very moment he was, *de facto*, following it. All the acts of the two parties show they were acting in observance of the custom. Mr. *Woollas-*

ton requires the sold note to be corrected, according to his sense of what the contract should be. Mr. *Cowie*, one of the Defendants, requires a bought note to be delivered.

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Looking at all these facts, we think that if there be no other evidence, or circumstances to the contrary, we must come to this conclusion, that the transaction is to be considered as a contract by bought and sold notes, and to be governed by the rules applicable to such a contract. What is there in this case which militates against such a conclusion? The fact that after the sold note had been shown to Mr. *Woollaston*, and he had objected to the word "usual," the same note had been shown to Mr. *Cowie*, and as Mr. *Holmes* says, he thinks, read over by him, and afterwards, as he deposes, the word "usual" struck through, and the initials "H.C." of *Cowie's* name added by him.

It is contended, on the part of the Respondents, that the conclusion to be drawn from this circumstance is, that Mr. *Cowie*, by this act, so sanctioned the sold note, that he and his firm were bound, by all the conditions therein contained, that such note immediately constituted the contract between the parties, and if accepted by the Respondents, became binding upon the Appellants, entirely abrogating, *pro hac vice*, the customary mode of dealing by bought and sold notes, and all the legal results arising therefrom. It may be true, that merchants dealing *inter se* are not bound by any customary mode of contracting, and that they may adopt another and a different mode of contracting, if they think fit; but we are of opinion, that the presumption is strongly in favour of the custom, and that any alleged deviation therefrom must be strictly proved.

Now, what was the course of this transaction? Mr.

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Cowie, as the acting partner of his firm, communicates with Mr. *Holmes*, the broker, and they come to some understanding as to the terms on which the indigo is to be purchased. The custom of dealing by bought and sold notes having been proved, it must be presumed that Mr. *Cowie* intended so to deal, till the contrary be proved. Mr. *Holmes*, conceiving that he understood the terms agreed upon by Mr. *Cowie*, embodied them in the sold note, which he sent to Mr. *Woollaston*, the seller. There is neither proof nor presumption that Mr. *Cowie* saw this note before it was sent. Mr. *Woollaston* returns the note through Mr. *Holmes*, with an objection to the word "usual." Mr. *Holmes* has an interview with Mr. *Cowie*, and tells him that he cannot finish the transaction unless the word "usual" be struck out; and so far as it appears, it was for this, and this only purpose, that the sold note was shown to Mr. *Cowie*. Mr. *Holmes* thinks he read it; assuming he did, he read it for the purpose of considering whether he should comply with the demand made—whether he should consent to one professed and designated alteration; he was not (whatever might be the legal consequences) *de facto* required to read it, with a view to determine whether it contained the terms he intended to contract upon; first of all, was it intimated to him, that by the act he was asked to do, he would depart from the accustomed usage, and irrevocably bind himself and partners by that single note? This signature of the alteration can only be taken to indicate his approval of, or rather his assent to, that alteration.

We are of opinion that it would be exceedingly dangerous to the safety of all mercantile transactions, which so mainly depend upon usage, and the observance of it, if we were to infer from a circumstance of this

description, that the purchasers were bound by this sold note alone, contrary to the custom, contrary to the course of the transaction itself, thereby establishing a contract by an act not in itself purporting so to do, and of the consequences of which Mr. Cowie was not apprized, and which no mercantile man could be expected to surmise.

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We are of opinion that the contract was not, as held in the judgment, evidenced by the sold note alone; but that it was a contract by bought and sold notes, according to the custom in use, and to be so dealt with. We think that the established usage of dealing in the mercantile world should be held in high respect; the very existence of such usage shows that in practice it has been found useful and beneficial; the presumption is in its favour, and no departure from it is to be inferred from doubtful circumstances, and especially not from circumstances, which, in the opinion of mercantile men generally, would not be conceived to produce any such consequences.

The Court below relied on the case of *Rowe v. Osborne*. Though this was only a decision at *Nisi Prius*, yet we acknowledge its weight, as being the opinion of a most eminent Judge (Lord *Ellenborough*), peculiarly conversant with mercantile contracts; but we think that case is so materially distinguishable from the present, that it is not only not directly applicable, as was admitted by the Court below, but that the principle on which Lord *Ellenborough* relied cannot be made applicable to the circumstances of the present case. In *Rowe v. Osborne*, the note delivered to the vendor was actually signed by the purchaser; the note of the contract afterwards sent to the purchaser differed from it. Lord *Ellenborough* held that the note signed

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by the purchaser constituted the real contract. The principle upon which Lord *Ellenborough* so ruled is not stated, but we apprehend it must have been this, that the signature clearly evidenced the consent of the purchaser to buy on the terms stated in the document; for that purpose, and that purpose only, could the document have been submitted to him, for his signature; and being so signed by him, the necessary and inevitable conclusion, in the absence of fraud, is, that he knew and approved of the terms, and expressed such approval by his signature. The vendor having assented to those terms, there was a complete contract between the two parties; and the very fact of such a signature by a party being contrary to the custom of buying by bought and sold notes (which are signed by the broker), showed that he relied upon himself, upon his own act and deed, in concluding the bargain, and not upon the broker, or on any note to be hereafter delivered to him.

The present case we think essentially different. Here the note received no signature from the party; it was submitted to the party, not for the purpose of considering if it contained his intentions, but solely and exclusively for the purpose of asking Mr. *Cowie's* consent to the removal of one word, and to that removal he consents, and affixes his initials in approbation of that removal, and nothing else. We cannot consider this as a proof of knowledge of contents, and consent to be bound by the whole instrument, abandoning the usual mode of contract by bought and sold notes. We have examined all the other authorities cited at the Bar, but we do not think they apply with sufficient closeness to require any further investigation.

We feel bound, therefore, to differ from the Supreme Court, and the Judgment they have pronounced, on this part of the case. We think that this must be considered as a transaction in the contemplation of the parties by bought and sold notes, and that the contract is contained in both of the notes, and not in one. If this be so, it is admitted that there is a material variation between the two notes; and then the consequence follows, from all legal principles, that no binding contract has been effected. To such purport is the decision of the Common Pleas in *Thornton v. Kempster* (5 Taunt. 786). To use the words of Mr. Baron *Parke* in another case, the parties never have contracted in writing *ad idem*.

For these reasons we are of opinion that the Judgment of the Court below must be reversed, and judgment be entered for the Defendants below, the Appellants here.

I must add, however, that this is the judgment of the majority of their Lordships, and that the Chancellor of the Duchy of Cornwall was inclined to have taken a different view of this case.

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THE QUEEN, on the Prosecution of the BOMBAY
GOVERNMENT,

AGAINST

EDULJEE BYRAMJEE and seventeen others.*

*On Petition from the Supreme Court of Judicature at
Bombay.*

*Practice—Privy Council—Appeal to in criminal cases—Right of accused—
Supreme Court Charter (Bombay) of 1823—Construction.*

The *Bombay* Charter of the 8th Dec. 1823, (granted in pursuance of the powers conferred to the Crown by 4 Geo. IV., c. 71,) after providing “That in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature at *Bombay* shall have the full and absolute power and authority to allow or deny the Appeal of the party pretending to be aggrieved,” proceeds thus:—“And we do hereby also reserve to ourself, our heirs, and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a Judgment or determination of the Supreme Court of Judicature, at *Bombay*, to refuse or admit his, her or their Appeal thereupon, upon such terms and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary, such Judgment or determination as to us or them shall seem meet.”

Upon a Petition, praying for leave to Appeal from a conviction for felony: held by the Judicial Committee of the Privy Council, that there was no power reserved to the Crown by the Charter, to allow Appeals in criminal cases, such Appeal being confined to civil cases only.

4th & 8th
April 1846.

THERE were two petitions in this matter. The first was the petition of *Eduljee Byramjee*, a tent maker, late of *Bombay*, but now a prisoner at *Singapore*, undergoing sentence of transportation, presented

* Present: Members of the *Judicial Committee*,—The Lord President (the Duke of Buccleuch), the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, and Sir E. Ryan.

Held also, that the Charter having been granted by the Crown, by force of an Act of Parliament, must be construed with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction: and that the Supreme Court alone has full and absolute power, to allow or deny permission to appeal in criminal cases.

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Semble. No Appeal lies, in cases of felony, to the Queen in Council, from any of the dominions of the Crown of *Great Britain*, which are governed by the law of *England*.

on behalf of himself and eight *Parsees*, also undergoing sentence of transportation at *Singapore*, and praying that Her Majesty would be graciously pleased to direct the issue of a free pardon to the Petitioner and the other convicted parties, or that Her Majesty would be pleased to refer the matter of the Petition, and the case of the Petitioner, with the circumstances of the trial, to the consideration of the Judicial Committee of Her Majesty's Privy Council, to report thereon, or that Her Majesty would be pleased, by and with the advice of Her Privy Council, to make such order for the admission and prosecution of an Appeal from the Judgment of the Supreme Court, and that Her Majesty would in like manner be pleased to make an order for the production of true and exact copies of all evidence, proceedings, judgments, decrees, and orders, had or made in the prosecution in the Supreme Court, and of the Judges' notes of the evidence taken before the Court, and of the reasons given by the Judges of the Court, and also the evidence taken before the Chief Magistrate of *Bombay*, by the direction of the Chief Justice of the Supreme Court, and all papers in the possession of the Right Honourable the Earl of *Ripon* (the then President of the Board of Control) and the Secretary of State, relating to the trial and the case of the Petitioner, and for the taking any necessary evidence, and that Her Majesty would be pleased to reform, correct, or vary such Judgment,

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THE QUEEN and make such further or other order in the forms, as
to Her Majesty might seem meet.

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The Petition set forth that an indictment was preferred in the Supreme Court of Judicature at *Bombay*, in the second sessions of the year 1844, against the Petitioner and seventeen other persons, *Parsees*, for the murder of a *Parsee*, named *Muncher-jee Hormusjee*. That the Petitioner and sixteen others were charged as accessories to the murder. That the trial took place on the 17th *July* 1844, and lasted ten days, before Sir *Henry Roper*, Chief Justice, and Sir *E. Perry*, Puisne Judge, and a Jury of Europeans, when the Jury returned a verdict of guilty against ten, including the Petitioner, and acquitted the remainder of the parties charged. That the Petitioners presented a Petition to the Judges of the Supreme Court, for leave to Appeal to Her Majesty in Council, against the direction of the Chief Justice, and the verdict and conviction founded thereon, upon the grounds and under the circumstances therein specially set forth. That such Petition was not complied with by the Judges, but that the extreme penalty of the law was carried into effect against one of the parties charged, and the remainder were sentenced to be transported for life to *Singapore*.

The principal allegations contained in this Petition, were verified by affidavit.

The second Petition was presented on the part of upwards of six thousand inhabitants of *Bombay*, and after setting forth, in substance, the circumstances contained in the first-named Petition, prayed that Her Majesty would be pleased to exercise her prerogative of mercy, in favour of such of the convicts as she might deem entitled to remission of their sentences, and to grant them pardon.

Both Petitions were referred by the Crown to the ^{1846.} Judicial Committee of Her Majesty's Privy Council, ^{THE QUEEN} and now came on for hearing.

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Mr. *Hill*, Q. C., and Sir *John Bayley*, in support of the first Petition.

The jurisdiction of Her Majesty in Council, to entertain Appeals in criminal sentences in *India*, is undoubted. *Poonekooty Moodeliar v. The King* (a). *Aga Mahomed Kurboolie v. The Queen* (b). Both these cases were upon indictment.—[Sir *E. Ryan*: These are cases in which the Appeal was allowed by the Court below, which differs from the present application.]—The Charter of Justice, of *Bombay* (c), gives a right of Appeal, in all indictments, informations, and criminal suits, and expressly reserves to the Crown the power to refuse or admit an Appeal from any Judgment or

(a) 3 Knapp's P. C. Cases, 384. (b) 4 Moore's P. C. Cases, 239.

(c) The following are the clauses relating to the Criminal Jurisdiction, and the right of Appeal to the Queen in Council, as contained in the Charter, or Letters Patent, of the 8th *December* 1823, for establishing the Supreme Court of Judicature at *Bombay*.

“And it is our further will and pleasure, and we do hereby grant, ^{Supreme Court, a Court of Criminal jurisdiction, and of Oyer and Terminer.} order, ordain, and appoint, that the said Supreme Court of Judicature, at *Bombay*, shall also be a Court of Oyer and Terminer, and Gaol delivery, in and for the town and island of *Bombay*, and the limits thereof, and the factories subordinate thereto ; and shall have and be invested with the like power and authority, as Commissioners, or Justices of Oyer and Terminer, and Gaol delivery, have, or may exercise, in that part of *Great Britain* called *England*, to enquire, by the oaths of good and sufficient men, of all treasons, murders, and other felonies, forgeries, perjuries, trespasses, and other crimes and misdemeanors heretofore had, made, done, or committed, or which shall hereafter be had, done, or committed, within the said town and Island of *Bombay*, or the limits thereof, or the factories subordinate thereto.” [The Charter then proceeds to give authority to the

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determination of the Supreme Court, upon such restrictions and regulations, as the Crown shall think fit

Court to issue a precept to the sheriff to summon juries and witnesses, with power to punish for contempt, &c.] “And to proceed to hear, examine, try, and determine the said indictments and offences, and to give judgments thereupon, and to award execution thereof. And in all respects to administer criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, or as our Courts of Oyer and Terminer and Gaol delivery do or may in that part of *Great Britain* called *England*, due attention being had to the religion, manners, and usages of the native inhabitants.

The Court of Oyer and Terminer may reprieve execution of any capital sentence, until the King's pleasure is known.

“And whereas cases may arise wherein it may be proper to remit the general severity of the law, we do hereby authorize and empower the said Court of Oyer and Terminer and Gaol delivery to reprieve and suspend the execution of any capital sentence wherein there shall appear, in the judgment of the said Court, a proper occasion for mercy, until our pleasure shall be known. And the said Court shall, in such case, transmit to us, under the seal of the said Court, a state of the case, and of the evidence, and of the reasons for recommending the criminal to our mercy, or for such reprieve or suspension, as the case may be: in the mean time, the said Court shall cause such offender to be kept in strict custody, or deliver him or her out to sufficient bail or mainprise, as the circumstances shall seem to require.

Appeal to the King in Council.

“And it is our further will and pleasure, and we do hereby direct, establish, and ordain, That if any person or persons shall find him, her, or themselves aggrieved, by any Judgment or determination of the said Supreme Court of Judicature, at *Bombay*, in any case whatsoever, it shall and may be lawful for him, her or them to Appeal to us, our heirs or successors, in our or their Privy Council, in such manner, and under such restrictions and qualifications as are hereinafter mentioned, that is to say, in all Judgments or determinations made by the said Supreme Court of Judicature, at *Bombay*, in any civil cause, the party or parties against whom, or to whose immediate prejudice, the said Judgment or determination shall be or tend, may by his or their humble petition, to be preferred for that purpose

to impose. The Statute 7th & 8th *Vict.*, c. 69, also provides for the admission of Appeals from any judg-

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to the said Court, pray leave to Appeal to us, our heirs or successors, in our or their Privy Council, stating in such petition the cause or causes of Appeal. And in case such leave to Appeal shall be prayed by the party or parties who is or are directed to pay any sum of money, or to perform any duty, the said Court shall, and is hereby empowered to award, that such determination or Judgment shall be carried into execution, or that sufficient security shall be given for the performance of the said Judgment or determination as shall be most expedient to real and substantial justice.

“Provided always, that where the said Court shall think fit to order the Judgment or determination to be executed, security shall be taken from the other party or parties for the due performance of such Judgment or Order, as we, our heirs or successors, shall think fit to make thereupon. And in all cases we will, and require, that security shall also be given to the satisfaction of the said Court, for the payment of all such costs as the said Supreme Court of Judicature, at *Bombay*, may think likely to be incurred by the said Appeal, and also for the performance of such Judgment or Order as we, our heirs or successors, shall think fit to give or make thereupon; and upon such Order or Orders of the said Court thereupon made being performed to their satisfaction, the said Court shall allow the Appeal, and the party or parties, so thinking him, her or themselves aggrieved, shall be at liberty to prefer and prosecute his, her or their Appeal to us, our heirs or successors, in our or their Privy Council, in such manner and form, and under such rules, as are observed in Appeals made to us from our plantations or Colonies, or from our Islands of *Guernsey*, *Jersey*, *Sark* or *Alderney*.

“And it is our further will and pleasure, and we do hereby direct and ordain, that in all such cases the said Supreme Court of Judicature, at *Bombay*, shall certify and transmit, under the Seal of the said Court, to us, our heirs or successors, in our or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees, and orders, had or made in such causes appealed, as far as the same have relation to the matter of Appeal.

“And it is our further will and pleasure, that in all indictments, informations, and criminal suits, and causes whatsoever, the said Court in such Appeal, to transmit a copy of all evidence and proceedings. In criminal suits the Court may allow or

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ments, sentences, decrees, or orders, of any Court of Justice within any British colony or possession abroad, although such Court should not be a Court of Error, or a Court of Appeal, within such colony or possession. It is true that the *Bombay* Charter gives the Supreme Court the power to allow or deny Appeals, but the Crown has expressly reserved to itself the power to refuse or admit an Appeal, even though denied by the Supreme Court. It never could be meant that the Supreme Court should have the power of saying, peremptorily, that its decisions, in criminal matters, should not be reversed, which it would in effect do, by refusing leave to Appeal. Such Appeal is an incident to the powers of this Court, which stands in relation to Colonial Courts, as the Queen's Bench does to the inferior Courts in this country. In *Re Ames* (a), leave was granted here to Appeal from a criminal proceeding in *Jersey*, which being found to be contrary to an express Ordinance in force in *Jersey*,

(a) 3 Moore's P. C. Cases, 409.

deny Appeal, and regulate the terms.

Supreme Court of Judicature, at *Bombay*, shall have the full and absolute power and authority to allow or deny the Appeal of the party pretending to be aggrieved, and also to award, order, and regulate the terms upon which Appeals shall be allowed in such cases in which the said Court may think fit to allow such Appeal.

Reservation of power to the King to refuse an Appeal.

"And we do hereby also reserve to ourself, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a Judgment or determination of the Supreme Court of Judicature, at *Bombay*, to refuse or admit his, her or their Appeal thereupon, upon such terms, and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary such Judgment or determination, as to us or them shall seem meet."

such leave was afterwards rescinded. Mr. Baron *Parke*, ^{1846.} in delivering judgment, says, “We are not disposed ^{THE QUEEN} to say that we have not the power so to have done, ^{v.} as Her Majesty is the head of justice, and we are sit- ^{EDULJEE} ting here, not merely as a judicial body, but as Privy ^{BYRAMJEE.} Councillors, and the matter of the former Petition was referred to us generally.” So, here the matter is referred generally.—[The Right Hon. *T. Pemberton Leigh*: Is this merely a Petition for leave to Appeal?]
 The Attorney-General: More than that is prayed for: the exercise of the Royal mercy; but your Lordships cannot advise on that part of the Petition. It could never have been intended to refer to your Lordships, sitting as the Judicial Committee of the Privy Council, an application to Her Majesty to grant a free pardon.—[The Right Hon. *T. Pemberton Leigh*: In the Petition of the States of *Guernsey* (*a*), referred by the Crown, to the Committee for the affairs of *Jersey*, the reference was larger than was intended, but we reported only upon the law of the case, namely, the legality of the acts done.]—Mr. *Hill*: Enough appears on the face of the Petition to authorize your Lordships to report to the Crown generally.—[The Right Hon. Dr. *Lushington*: Their Lordships are of opinion, that it was not intended by the reference, to refer to them any question, whether mercy should be extended by the Crown to the Petitioners; you will therefore confine yourself to two questions: first, whether there is any power in the Judicial Committee to advise Her Majesty to permit an Appeal; and, secondly, if they have such power, whether they would exercise a proper discretion in so advising.]—Mr. *Hill*: This is a Charter granted by the Crown, by virtue of

(a) 10th Dec. 1844.

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 BYRAMJEE. the Statute 4 *Geo.* IV., c. 71; and if there were no reservation in the Charter to admit Appeals, not otherwise provided for, the power of the Crown to admit Appeals would not have been parted with; for the Crown has no power to denude itself of any prerogative necessary to the administration of justice. It has no more right to weaken its power to give protection to the subject, than the subject has to diminish or qualify his allegiance. The rights of the sovereign and the rights of the subject are strictly correlative. Nothing appears in the Charter to warrant a conclusion that an Appeal cannot lie here in a criminal proceeding. The Crown can only be bound by express words. If a question is reserved by a Judge upon the trial of a prisoner, for the opinion of the fifteen Judges, they advise the Crown, in their discretion, to grant a free pardon. Their powers are limited, as in this Court, to advise the Crown. Then why should not this Court advise a free pardon? Enough appears from the Petition to justify such an exercise of the prerogative.—[The Right Hon. *T. Pemberton Leigh*: Is there any instance in which we have dealt with evidence settled by the verdict of a jury, and considered whether it was well founded or not?—The Court sat as a jury in *Cowas-jee v. Thompson* (a), and *Cowie v. Remfry* (b); and in *Gahan v. Lafitte* (c), though the verdict was sustained, yet the damages were cut down; this Court thereby exercising the highest discretion.—[The Right Hon. Dr. *Lushington*: Has any instance occurred where an Appeal has been granted by the Courts in *India* in the case of a felony?—None. The only criminal cases

(a) *Ante*, p. 422.

(b) *Ante*, p. 448.

(c) 3 Moore's P. C. Cases, 382; and see *Le Breton v. Ennis*, 4 Moore's P. C. Cases, 323.

appealed from *India* were *Pooneekooty Moodeliar v. The King*, and *Aga Mahomed Kurboolie v. The Queen*, which were indictments for misdemeanors.

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The Attorney-General (Sir *F. Thesiger*), and Mr. *Wigram*, Q. C., for the Crown, and the East India Company.

It is contrary to the policy of the Criminal Law in *England*, to allow an Appeal in cases of felony, and nothing can be found in the Charter of *Bombay* which gives such power. No mention is made of criminal suit or information in the reservation to the Crown to refuse or admit an Appeal. If a party here is improperly convicted, the only redress that can be had, is by application to the Crown for a pardon. Even with regard to a question of law that may arise upon the trial, the prisoner has no right of appealing to the fifteen Judges; it can only be done by the Judge who presides at the trial, reserving the point. If then there exists no right of Appeal in criminal cases in *England*, it must follow, that none is given by this Charter to *Bombay*, where the English law prevails. The case of *Re Ames* establishes, that no Appeal lies from a criminal proceeding in *Jersey*. *Pooneekooty Moodeliar v. The King* was an indictment for forgery, which was a misdemeanor, by Statute in *India*; and in *Aga Mahomed Kurboolie v. The Queen*, the Appeal here was strictly confined to a question of law. In each of these cases, the Supreme Court had granted, under the Charter, leave to Appeal; here they refused it, and their refusal is by the terms of the Charter absolute. It would be most mischievous to grant this application, the object being to Appeal from a conviction for felony.

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 THE QUEEN *v.* EDULJEE BYRAMJEE. In the month of *August*, in the year 1844, eighteen natives of *Bombay* were tried before the Chief Justice, assisted by a Puisne Judge. One of the prisoners, *Burjorjee Jamsetjee*, was charged with the wilful murder of a *Parsee*, named *Muncherjee Hormusjee*. He was found guilty, and executed. The seventeen other prisoners were charged as accessories to the murder, and were convicted and transported. 26th Jul 1847.

Two petitions, one signed by one of the individuals convicted, and another respectably and numerously signed by certain inhabitants of *Bombay*, were presented to Her Majesty. Those petitions set forth at great length, the circumstances attendant upon the trial, and prayed for the exercise of Her Majesty's prerogative in favour of the convicts, or that an Appeal might be allowed. Her Majesty has been pleased to refer the petitions above mentioned to us, not for the purpose of advising as to the exercise of Her prerogative of mercy, but as containing, together with the affidavits in support of them, a full statement of all the facts, and for the purpose of enabling us to advise, whether the persons convicted can be permitted to Appeal, under the circumstances set forth in those affidavits and those petitions, from the sentence of the Court.

Those petitions did not allege that any error appeared on the face of the record, but they complained of the direction of the Judge, the evidence, and the verdict.

Now if this question were to be decided by the law of *England*, it is notorious, that no prisoner convicted of felony could claim a new trial or a right of Appeal in this sense. A writ of error is another question,

which it is not necessary for us to discuss in this case. ^{1846.}
 The usual practice, where the Judgment is not post- ^{THE QUEEN}
 poned, is, if any objection be taken at the trial, which ["]
 the Judge who tries the prisoners does not admit to be ^{EDULJEE}
 valid, but deems worthy of consideration, to reserve it ^{BYRAMJEE.}
 for the opinion of the fifteen Judges. If the majority
 think the objection ought to have been sustained, the
 Judge who tried the prisoner reports to the Secretary
 of State, and the prerogative of the Crown is exercised
 in such a manner as the advisers of the Crown think
 meet. The prisoner has no legal right, in the proper
 sense of the term, to demand a re-consideration by a
 Court of Law of the verdict, or of any legal objection
 raised at the trial. Then if this be so by the law of
England, if the trial had taken place here, the question
 to be considered is, whether the prisoners, being
 natives of *Bombay*, and British subjects, and the offence
 being committed and tried there, have, by the law pre-
 vailing at *Bombay*, any other, and what right.

It appears from the Charter of *Bombay*, which was
 granted under the authority of an Act of Parliament,
 that the Supreme Court was constituted a Court of
 Oyer and Terminer, and Gaol delivery, to administer
 Criminal Justice in such or the like manner, or form,
 or as nearly as the condition and circumstances of the
 place and person will admit, as our Courts of Oyer and
 Terminer, and Gaol delivery, may or do in *England*,
 due attention being had to the religion, manners, and
 usages of the native inhabitants. So far it would seem
 that the same law would be applicable to convictions
 for felonies, whether tried in *England* or *Bombay*, and
 consequently, the Petitioners would have no legal right
 to an Appeal or re-hearing.

In the Charter, however, will be found several im-

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portant clauses touching Appeals, which require great attention, and more especially that clause which relates particularly to criminal cases. It is in the words following: "And it is our further will and pleasure, that in all indictments, informations and criminal suits and causes whatsoever, the said Supreme Court of Judicature at *Bombay* shall have full and absolute power and authority, to allow or deny the Appeal of a party pretending to be aggrieved, and also to award, order and regulate the terms upon which the Appeal shall be allowed in such cases in which the said Court may think fit to allow such Appeal." Now, however extensive the right of Appeal in criminal cases may be, the Supreme Court has full and absolute power and authority to allow or deny that Appeal. Presuming, therefore, for the present, that the words of this clause would sanction the granting of an Appeal of whatsoever kind in cases of felony, application for leave to Appeal was made to the Supreme Court, and was by that Court refused. If an Appeal then can now be granted, it must be on other grounds than the clause in the Charter; for according to the clause already cited, the rejection of the application to Appeal in the Supreme Court must be considered final.

This brings us to the consideration of the clause which immediately follows, and which is in the following terms: "And we do hereby also reserve to ourselves, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by the Judgment or determination of the Supreme Court of Judicature at *Bombay*, to refuse or admit his, her or their Appeal thereupon, upon such terms and under such limitations, restrictions and regulations as we or

they shall think fit, and to reform, correct or vary such Judgment or determination as to us or them shall seem meet.”

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The first question which arises upon this clause is one of considerable importance, and it is this, whether it applies at all to the preceding clause, or, in other words, whether the Crown has reserved to itself, by force of the latter clause, the right of Appeal in criminal cases, including of course felonies—for there is no express limitation. Of the power of the Crown to create or reserve such right there can be no doubt, because the Act of Parliament enables the Crown to grant such a Charter for the administration of justice in *Bombay*, as it may think fit. But in considering whether the Crown has done so or not, it is not unimportant to remember that not only in *England*, but throughout the dominions of the Crown of *Great Britain*, governed by the law of *England*, no right of Appeal in felonies has ever existed. Nor are we aware that in any one single instance the Crown has ever, by the exercise of its prerogative, granted leave to Appeal in any such case.

Under such circumstances, we think that it is not probable that the Crown in granting this Charter intended to make so extraordinary a deviation from the ordinary practice, and we are the more strongly inclined to this opinion from a consideration of the consequences which must inevitably follow. Where persons charged with the commission of felonies have been convicted, it is natural that they should resort to every possible means to escape from the penalty of the law, or to put off to the latest moment the execution of the sentence. Consequently, it is to be expected, that applications in almost every case for

1846. leave to Appeal, (supposing by Appeal is meant a
 THE QUEEN new trial, or an entire re-hearing,) would be made to
 v. the Supreme Court. As that Court is sitting upon
 EDULJEE the spot, no great delay or mischief might follow from
 BYRAMJEE. the postponement of the execution of the sentence,
 till that application was heard and disposed of. But
 if the Crown has really, by this Charter, reserved to
 itself the right of granting an Appeal in such cases,
 what are the inevitable consequences? To cause
 execution to be done, would be, in effect, to prevent
 the right of granting an Appeal vested in the Crown,
 and to take away from the prisoner convicted, the
 right of laying his case before his sovereign, and of
 obtaining a re-consideration of it. For it must be
 remembered, that if a re-consideration, by way of
 Appeal, be reserved to the Crown, the right of ap-
 plying for it must be reserved also. But if this were
 really the state of the law, we doubt whether any
 Court or any authority would think itself justified in
 ordering execution to be done, till there had been an
 opportunity given to the prisoner, of applying to the
 Crown, for a re-consideration of the case, according to
 the right reserved to the Crown, and the prisoner.
 Many very evil consequences must necessarily follow
 from this state of things. A long period must elapse
 before an application to the Crown could be made,
 and its decision could be known. And eventually,
 where the leave to Appeal was refused (and it must
 be presumed that this would generally be the case),
 execution would follow the sentence after so long an
 interval, that all benefit to be expected from a public
 example would be lost; and to this it may be added,
 that in a great majority of cases the convicts them-
 selves would be kept in a state of miserable suspense,

to suffer in the end the same ignominious death to which they were sentenced.

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For all these reasons, and especially because the reservation of the right of granting an Appeal would be to create an anomaly, unknown where the law of *England* prevails, we think the strong probability is, that the clause reserving to the Crown the right of granting an Appeal after refusal by the Supreme Court, was not intended to apply to cases of felony.

However powerful this reasoning may be to our minds, we still, however, fully admit that if such be the clear and undoubted meaning of the Charter, we must give effect to its provisions, however injurious we may conceive the consequences to be. To ascertain the meaning of this clause, we must look at the whole Charter, at what precedes and at what succeeds, and not merely at the clause itself.

It is first to be observed that the clause in question does not contain one of the words used in the preceding clause by which criminal cases were designated. There is not one word of "indictments, informations, or criminal suits." There is no expression directly referring to, and subjecting to further Appeal, the full and absolute power of allowing or denying Appeals in criminal cases conferred upon the Supreme Court. And yet if such had been the intention of the Charter, it would be natural to suppose that when such a power had been given to the Supreme Court in such very strong terms, the right of reviewing their decisions, if it were intended to be reserved, would have been expressed in language directly noticing the absolute power just before given, and in terms admitting of no doubt, establishing a control over that, as regards which, *prima facie*, by the plain meaning of

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 BYRAMJEE, the words, they were not to be subjected to any control or revision whatever. We do not find in this reserving clause, that which we should have expected to find if it applied to the preceding one, but we do find that from the commencement to the end, it is peculiarly applicable to civil cases, and that every expression in it may be satisfied by confining it to civil cases only.

In the clause of which the abstract in the margin is "Appeal to King in Council," it is directed that "any person aggrieved by the Judgment or determination of the Supreme Court in any case whatever, may Appeal to the Crown or to the Privy Council, in the manner and under the restrictions and qualifications" mentioned. The parties aggrieved are to petition the Supreme Court, which Court is empowered to award that such Judgment or determination shall be carried into execution, or sufficient security given for the performance of it. Various other regulations are added, which being complied with, the Supreme Court is bound to allow an Appeal, and the parties are permitted to prosecute it in the same manner as Appeals from the colonies. The clause now commented on is clearly confined to civil cases only. Upon comparing it with the reserving clause, we find that the matter over which the power of the Crown to grant Appeals is reserved, is expressed and described by the very terms which are used with respect to Appeals in civil cases. We are inclined, therefore, to hold that as the reserving clause is fully satisfied by confining it to civil cases, that construction is conformable with the general usage where the English law prevails.

In the preceding clause in this Charter, the Court of Oyer and Terminer is authorised to suspend the exe-

cution of any capital offence until the pleasure of the Crown be known, where there shall appear, in the judgment of the Court, proper occasion for the exercise of mercy. If the power of granting an Appeal in capital cases was reserved to the Crown, and consequently the right of applying for it, notwithstanding the refusal of an Appeal by the Court, would not it have been almost necessary to have given the Court, in such case, a power to suspend the execution of its sentence, if not to the criminal a right to require such suspension, till he might avail himself of his reserved right to apply to the Crown, not for mercy, but by way of Appeal? But we find no such power given.

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For these reasons, if in this case it were necessary to support the advice we intend to give to Her Majesty, upon the ground that the reserving clause does not extend to Appeals in capital cases, we should be disposed to come to that conclusion. If, however, we should have formed an erroneous opinion in this respect, we think, upon the supposition that the reserving clause does extend to felonies, that we should not advise Her Majesty to allow this Appeal. We conceive a power to grant an Appeal is confined by the words of the clause to a "Judgment or determination" of the Supreme Court; and that all, even in this view of the case, which could be done, would be to allow an Appeal for the purpose of ascertaining whether the "Judgment or determination" of the Court was erroneous in point of law with reference to the indictment, or, in other words, whether there was error upon the face of the record, as in *England*. We do not think that by any construction the Crown can grant an Appeal as to the verdict itself. We conceive that we could not go over again the merits of the case. That we have not,

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and could not have, any materials for such an investigation. And that to presume that it was intended that a new trial should take place, is unwarranted by the words of the Charter, and would be an anomaly in the legal proceedings of this country. The present application is not against the "Judgment or determination" of the Court, but it is an application against what was done on the trial, and against the verdict.

It may be argued that the Crown could not, even by Charter, part with its prerogative. But it must be recollected that this is a case in which the Crown grants a Charter by virtue of an Act of Parliament, and that Charter, we conceive, must be considered as granted in the execution of the powers which were granted by that Act of Parliament.

A very similar case occurred upon a former occasion, though not with respect to a criminal cause. I mean the case of *Cuvilier v. Aylwin* [which is reported 2 Knapp, p. 72], and which is to the following effect: The very same argument which was used by Mr. *Hill* was used by Mr. Justice *Coltman*, who was then Counsel for the Petitioner. It was this:—"An Act of the Parliament of *Great Britain* declared that all laws passed by the Legislature of *Canada* should be valid and binding within the colony, and directed, that the Colonial Court of Appeal should be subjected to such Appeal, as it was previous to the passing of the Act, and also to such further and other provisions, as might be made in that behalf by any Act of the Colonial Legislature:—Held, that an Act having been passed by the Colonial Legislature limiting the right of Appeal to causes where the sum in dispute was not less than £500 sterling, a petition for leave to Appeal, in a cause where the sum was of less amount, could not be re-

ceived by the King in Council, although there was a special saving in the Colonial Act of the rights and prerogatives of the Crown.”

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In that case the Judgment was given in but few words. The Counsel for the Respondent was not heard, but it was observed, “It is not necessary to hear Counsel on the other side. The King has not power to deprive the subject of any of his rights, but the King, acting with the other branches of the Legislature, as one of the branches of the Legislature, has the power of depriving any of his subjects in any of the countries under his dominions of any of his rights. This Petition must thereupon be dismissed.”

It was therefore held, that though there was a reservation of the right of the Crown, yet as the Act in *Canada* was made in pursuance of an Act of Parliament of *Great Britain*, the powers contained in that Act did take away the prerogative of the Crown. So we apprehend this Charter in *India* being granted in pursuance of an Act of Parliament here, if by the true construction of the Charter the prerogative of the Crown is in any way limited, it must be said to be limited, not by the Act of the Crown itself, but by the Act of the Crown acting under the authority of Parliament.

It is for these reasons that their Lordships are of opinion (and perhaps other reasons might be given arising from a consideration of the peculiar circumstances of the case), that they must humbly advise Her Majesty, that the prayer of the Petition cannot be granted.

THE QUEEN, on the Prosecution of the BOMBAY
GOVERNMENT,

AGAINST

SAMUEL STEPHENSON, ALLOO PAROO, and Others.*

*On Petition from the Supreme Court of Judicature at
Bombay.*

*Practice—Privy Council—Appeal to in criminal cases—Right of accused—
Supreme Court Charter (Bombay) of 1823—Construction.*

Under the *Bombay* Charter of Justice, the Supreme Court at *Bombay* is invested with full and absolute power to allow or deny an Appeal in criminal cases, and no power is reserved to the Crown by such Charter to grant leave to appeal in such cases.

The case of *Christian v. Corren* (1 P. Williams, 329) observed upon.

23rd June
1847.

THIS was a Petition for leave to Appeal from a Judgment of the Supreme Court of Judicature at *Bombay*, whereby the Petitioner, *Alloo Paroo*, and two others, were found guilty of felony, as accessories before the fact, to the burning of a ship, called the *Belvidere*. The indictment was preferred in the Supreme Court against *Samuel Stephenson*, for feloniously burning the ship, and the Petitioner and two others for aiding and abetting in the said felony before the fact. The trial of the Petitioner and two others as accessories (*Stephenson* not having been arrested) took place before Sir *H. Roper*, Chief Justice, and Sir *E. Perry*, Puisne Judge, at an Admiralty Session of the Supreme Court, when they were found guilty, and sentenced to transportation for life. Shortly after this conviction, the Petitioner presented a Petition to the Supreme Court, praying for leave to Appeal to Her Majesty in Council against the

* This and the preceding case, being decisions upon the same point, it is thought advisable to place them together.

Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—Assessors,—Sir A. Johnston, and Sir E. Ryan.

trial, conviction, judgment, and sentence, upon various grounds, the principal of which was an objection, taken upon his arraignment by Counsel on his behalf, that under the Criminal and Statute Law existing in *Bombay*, he could not legally be tried upon an indictment, as an accessory before the fact, in the absence of, and until after the trial and conviction of, the party charged as principal, which, however, the Court overruled, and refused to grant leave to Appeal. The Petition set forth the indictment and proceedings on the trial, and prayed that Her Majesty would, by and with the advice of the Privy Council, make such Order as should seem fitting for the admission and prosecution of an Appeal from the Judgment of the Supreme Court, and for the production of true and exact copies of the indictment, and of all evidence, proceedings, judgments, decrees, and orders, given, had, or made, in the prosecution in the Supreme Court, and of the Judges' notes of the evidence, and of the reasons given by the Judges at the trial, and their refusal to allow leave to appeal against the conviction and judgment.

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Mr. *Hill*, Q. C., Mr. *Robinson*, Sir *John Bayley*,
and Mr. *Accroyd*, in support of the Petition,

Cited the cases of *Pooneekooty Moodeliar v. The King* (a), *Aga Mahomed Kurboolie v. The Queen* (b), *In re Ames* (c), *D'Orliac v. D'Orliac* (d), *Hulm v. Hulm* (e), *Christian v. Corren* (f), *Rex v. Moreley* (g), and the Charter of *Bombay* of the 8th December 1823 (h).

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|---------------------------------|---------------------------------|
| (a) 3 Knapp's P. C. Cases, 348. | (b) 4 Moore's P. C. Cases, 239. |
| (c) 3 Moore's P. C. Cases, 409. | (d) 4 Moore's P. C. Cases, 374. |
| (e) 4 Moore's P. C. Cases, 262. | (f) 1 P. Williams, 329. |
| (g) 2 Burr, 1041. | (h) <i>Ante</i> , 471, 2, 3, 4. |

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Mr. *Wigram*, Q. C., and Mr. *Forsyth*, on the part of the East India Company, opposed the Petition.

Lord BROUGHAM:

26th June
 1847.

This case, to a certain decree, resembles the case which has been already spoken to. But in one material respect, no doubt, it may be said to differ from it, because I do not understand it to have been argued at the Bar, in *Alloo Paroo's* case, that there lay an Appeal from the verdict of a jury, for the purpose of obtaining a new trial. I understand the question raised there was, (at least it appears to me perfectly hopeless to argue any other point,) that a Writ of Error lay, or a proceeding in the nature of a Writ of Error, for some defect of law or jurisdiction appearing upon the record. Be that as it may, however, their Lordships are of opinion, that taking the terms of the Charter into consideration, and having regard to the origin of that Charter, namely, that it was not a mere act of the Crown, by force of the prerogative, but in execution of a power conferred upon the Crown, by Statute; the Charter, by its terms in execution of that Statute, does not reserve a power to the King in Council, of reviewing a determination of the Court below, in a criminal case, the Court below having denied the application for such a review.

That this is in execution of a statutory power, is clear. A Statute was made, in the 4th year of the late King, *George IV.*, which gave the Crown the power to grant a Charter to a Court of Justice in *Bombay*, with the same powers, immunities, jurisdiction and authority, as were vested in the Court at *Fort William*, by virtue of another statutory power,

granting that Charter, namely, the 13th of *George III.*, chap. 63.

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That Statute contains a power to the Crown, to grant an Appeal, in such manner, and in such cases, and on such security, as to the Crown shall seem meet. Then, when we look at the Charter granted in execution of that power, constituting the Supreme Court at *Fort William*; bearing in mind that, by the 4th of *Geo. IV.*, c. 71, the Court in *Bombay* is to be a model of that Court, we find there that the reservation, after the grant of Appeal, is in the same terms with the section brought in question now before us, as to *Bombay*, respecting criminal cases;—that the reservation, which follows the section touching Appeals in criminal cases, is confined strictly to civil cases.

Some doubt might have arisen upon the section in the *Bombay* Charter, following the section upon criminal cases. Some doubt might have arisen from the frame and structure of that section, whether it were confined to civil cases or not; for that part which clearly confines it to civil cases, limiting the sum appealed from to 3,000 *Bombay* rupees, is in a separate proviso, and follows, after an interval, from the first, and reserving part of the section, that interval being filled up by the power given to the Court to execute judgments and orders. But when we look at the *Fort William* Charter, which is to be the foundation and model of this Charter, we find, that no doubt whatever exists there, that the reserved power refers to civil cases, for it is part and parcel of that section, reserving the power to the King in Council, that it shall not exceed the sum of 1,000 rupees.

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The section itself, if it had stood alone, without that reserved power, appears to us clearly to vest an absolute discretion in the Court below, in which the Judgment is had ; to refuse, as well as to grant, the Appeal: for it is said, that in “all indictments, informations, and criminal suits and causes whatever,” which are large words certainly, “the said Supreme Court of Judicature shall have the full and absolute power and authority, to allow or deny the Appeal of the party, and also to order and regulate the terms upon which the Appeal shall be allowed, in such cases in which the said Court may think fit to allow such Appeal.”

Now, first of all, arises upon this, the obvious consideration from the words, that it seems impossible to give a discretionary power, of either allowing or denying, in more clear and plain terms, than these terms are, “full and absolute power to allow or deny.” And then, that is followed by saying that the terms may be regulated by the Court “in cases in which the said Court may think fit to allow such Appeal,” being a very ordinary expression used in Acts of Parliament, when it is intended that a power given to any officer or any body for public purposes, shall not be absolute and compulsory upon that individual officer, or that body, but shall be discretionary in that individual officer or body, to exercise or not, as he or they shall please, and be advised. If the words are “It shall and may” be so and so done, by such and such officer and body, then the word “may” is held in all soundness of construction to confer a power, but the word “shall” is held to make that power, or the exercise of that power, compulsory ; cases are not wanting where, even without the use of so stringent a word as “shall,” it has

been held that a power so conveyed must be executed. But where it is intended not to compel, but to leave it optional with the parties, the words "think fit" are the very ordinary technical and appointed words, to show that the power is not compulsory. And those words occurring in this clause, they seem really to leave no reasonable doubt, that a discretion is vested in the Court below, of denying as well as of allowing an Appeal.

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This is still further clear when we come to look at other Charters, in which it is not intended to give the power absolutely, but in which it is intended that the Court shall be, to a certain decree, *quasi* ministerial in granting leave to Appeal. For in all those cases, if we look to them, we shall find that this is the course adopted by the Charter. The party is to appeal to the King in Council. He is first, before appealing, to petition the Court, of whose sentence he complains, and then it is (this is the course in almost all cases, I know of no exception), that the party has the right to Appeal. In order to prosecute his Appeal, he must first petition the Court for leave; if the Court shall grant leave to Appeal, they are then to prescribe certain terms, as in the case of a Judgment; he is to give a certain security, and in some cases security must be given for the costs; but in none of those cases do we find anything like this other alternative, "in case the Court shall refuse leave to Appeal," because it is not intended to oust the party, of his privilege to apply here, even in the case of the Court having refused to comply with his petition. The words, "if they shall think fit," are never inserted there. This is a totally different clause, differently framed, and with another and entirely different object. The cases which have

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been cited, have been already partly disposed of, by what has been said by their Lordships in the last case. The case of *Christian v. Corren*, from the *Isle of Man*, in *Peere Williams*, really proves nothing. The argument is the argument of Mr. *Peere Williams* himself, for it is not the Judgment of the Court. No doubt *Peere Williams* is a great authority as a reporter, a very learned person, and I believe a very accurate reporter, he is generally allowed to be ; but what he says there, is no part of the Judgment of the Court. He says, even if there be express words in the Charter, excluding the right of the subject, those words shall not be held to deprive the subject of his common law right of Appeal to the Crown, in order that justice may not fail. The Court, which was assisted in that case by Lord Chief Justice *Parker*, in giving their Judgment, proceed upon no such ground. They only say, in this case there is nothing to take away the general right of Appeal, which is necessary to prevent a failure of justice. And Lord Chief Justice *Parker*, in that case, observes that the Court of Chancery, even in the case of a proceeding of a Copyhold Court, if anything were done against good conscience, would review it, and would direct that the Court should re-assemble, for the purpose of acting more conscientiously. But it is certain, that that case was not borne out by the judgment of the Court of Chancery, when an attempt was made in a case before Lord *Jeffries*, Lord Chancellor ; which had been very much considered at the Rolls by Mr. Serjeant *Trevor*, who was then Master of the Rolls, and where such a power to interfere was wholly denied. *Ash v. Rogle* (1 Vern. 367).

It is quite unnecessary, however, to enter into that,

because it is quite sufficient to observe, that the Lord Chief Justice, in granting that right of Appeal which has been contended against, does not in the slightest degree bear out the generality of Mr. *Peere Williams's* argument.

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But even if the argument of Mr. *Peere Williams* had been entirely confirmed and adopted by the Court, it does not apply to this case. Because there is no question here of the power of the Crown to abandon the prerogative. The Crown may abandon a prerogative, however high and essential to public justice, and valuable to the subject, if it is authorized by Statute to abandon it ; and here it is in the execution of a power conferred by Statute, that this abandonment, if any abandonment has been made, has taken place.

It must be observed, likewise, that there is no abandonment of the right of a subject to Appeal to the King in Council ; for there is an express provision made as to the manner in which that Appeal shall be exercised, and for the Crown having the power. It might be reasonably contended that the Crown may point out the manner in which the general common law right of Appeal to it from colonial sentences shall be exercised, by a particular mode of enactment in the Charter. It may say, there is a right to Appeal to the Crown generally. That Appeal shall be in civil cases at all times, but that Appeal shall be in criminal cases only in a certain manner and form, and I shall delegate to my Judges below; the right (the Crown may say) to refuse or to grant it, as they see fit. I see nothing contrary to the prerogative. I see nothing contrary to the right of the subject, as involved in the exercise of that prerogative of the Crown, having even independently of the Statute,

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laid down the right in that particular form ; but that is wholly unnecessary in this case, and I throw it out only to meet the argument in *Peere Williams*, and not the argument here, which is quite another case, and rests upon other grounds. It is wholly unnecessary to deal with that abstract at all for our present purposes, because this is the case of the execution of a power granted by Statute, to which undoubtedly the case of *Cuvillier v. Aylwin* would almost in terms apply.

Their Lordships, therefore, are of opinion, that, in this case, even if the argument were confined to the matter of error appearing upon the record, there is no ground whatever for holding, that the Crown has reserved its power of receiving an application of this kind against the decision of the Court below, and that the Court below alone has the power of granting or refusing an Appeal in such cases.

It is unnecessary of course to argue the question of an application for a new trial or for a re-consideration of the whole case, because that is still more clear. But clear enough it is, even if the question were confined to a mere error upon the record.

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ADOPTION.

A childless Hindoo, by Deed, directed his wife to adopt a child. After his death, his widow brought a suit for a partition, and to be put in possession of her husband's share, in the joint undivided estate. Pending the suit, she adopted a son. By the Hindoo law, the act of adoption divested the property from the widow, and vested it in the adopted son, subject to the maintenance of the widow. Notwithstanding the adoption, the suit was prose-

cuted in the widow's name, and a Decree made, directing her to be put in possession.

Held, in such circumstances, that she prosecuted the suit as the guardian of the adopted son, and was put into possession as his trustee, and accountable to him for the profits of the property so decreed to her. [*Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*] - - 229

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Upon a Petition, praying for leave to appeal from a conviction for felony; held by the Judicial Committee of the Privy Council, that there was no power reserved to the Crown by the Charter, to allow Appeals in criminal cases, such Appeal being confined to civil cases only.

Held also, that the Charter having been granted by the Crown, by force of an Act of Parliament, must be construed with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction: and that the Supreme Court alone

and upon his opinion, declared the Plaintiff's tribe entitled to have the ceremonies performed for them by *Brahmins*. Upon appeal, the Provincial Court remitted the suit to the *Zilla* Court, to take evidence, and upon such evidence, and the opinions of the *Pundits*, which the Provincial Court took upon the same statement as the *Zilla*, they affirmed the Decree. The *Sudder Dewanny Adawlut*, upon the whole case, reversed these decisions. Held by the Judicial Committee of the Privy Council, reversing the decisions of the three Courts, that the whole proceedings were irregular, and contrary to the express provisions of the *Madras* Regulation XV. of 1816, sec. x., cl. 3 & 4, which required the Judge to record the points necessary to be established, before the evidence could be taken; the opinion of the *Pundits* being also taken upon an assumed statement of facts, not admitted or recorded. But in consideration of the circumstances, such reversal was without prejudice to bringing a fresh suit. [*Namboory Setapaty v. Kanoo-Colanoo Pullia*] - - - - - 359

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EVIDENCE.

Debt on bond. The Defendant, by his answer, denied his execution of the bond. The Plaintiff, in his reply, stated the accidental destruction of the bond, and prayed leave to put in evidence a registered copy thereof, which the Court allowed, and, at the same time, ordered the fragments of the original to be

produced. At the trial the Plaintiff produced the fragments, and, under sec. 11, *Madras Reg. XVII.* of 1802, put in as evidence a registered copy of the bond. He called no witnesses to prove that the fragments produced formed part of the original bond. The Court admitted the registered copy as evidence, and found for the Plaintiff. The Judicial Committee of the Privy Council, on appeal, reversed this finding, on the ground that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence. [*Syud Abbas Ali Khan v. Yadeem Ramy Reddy*] - - - 156

EVIDENCE OF PAYMENT.

The statement in a Deed of Compromise, that the consideration money was paid, is not of itself, according to the practice of the native courts in *India*, conclusive evidence of such payment, and may be rebutted by evidence of non-payment.

Where payment is denied and evidence of non-payment produced, the burthen of proof that the money was paid, lies on the debtor. [*Chowdry Deby Persad v. Chowdry Dowlut Sing*] - - - 347

HIGHWAY RATE.

By Stat. 33 *Geo. III.*, c. 52, s. 158, (for among other things, making better provisions for the good order

and Government of the towns of *Calcutta, Madras and Bombay*,) assessments are directed to be made on the owners or occupiers of houses, buildings and grounds, “according to the true and real annual values thereof.”

Upon a rate made in pursuance of this Statute, the Quarter Sessions at *Bombay* assessed the annual value of a cotton pressing factory, having fixed machinery, upon the gross receipts, after making an allowance of ten per cent. for tenants’ profits. Held by the Judicial Committee, reversing the Order of Confirmation of the Sessions, by the Supreme Court, and quashing the rate, that the principle of the assessment was erroneous, the proper measure of rateable value of the building being the rent (subject to the deductions required by the Statute 6 & 7 *Wm. IV.*, c. 96) that the building might reasonably be expected to be let for, to a yearly tenant. [*Fawcett v. The Justices of Bombay*] - - - 408

HINDOO LAW.

See “ADOPTION.”
“COPARCENARY.”
“LEASE.”

INDIAN WILL ACT.

See “WILL.”

INHERITANCE.

See “MAHOMEDAN LAW.”

INTEREST.

According to the practice of the Native Courts in *Bombay*, a sum found due for mesne profits, is a judgment debt, and carries interest by its own force.

On Petition in the Native Court, after Decree upon appeal in *England*, interest awarded on the amount of mesne profits decreed, although not prayed for in the plaint, or given by the Decrees in *India*, or the Order of affirmance in *England*. [*Kirkland v. Modée Peston-jee Khoorsed-jee*] - - - - 220

JUDGE.

See "ASSIGNMENT."

JURISDICTION.

An inhabitant of *Benares*, trading at *Calcutta*, and having a house of business there, held to be subject to the jurisdiction of the Supreme Court. [*Baboo Janokey Doss v. Bindabun Doss*] - - - - 175

1. This Court will not act as a Court of original jurisdiction. Therefore, Where the Judge of the Court below improperly suppressed documents which were not discovered until after the transmission of the Appeal to Her Majesty in Council, their Lordships refused to give an opinion on the merits, and remitted the case to the *Sudder Dewanny Court*, for consideration. [*Juveer-bhaee v. Vuruj-bhaee*] - - 324

3. *Quere*. Whether the Civil Courts in *India* have any jurisdiction to entertain a suit, not involving any civil rights, as a matter of law, and make a declaration of the right to perform, or have performed, any religious ceremonies. [*Namboory Setapatty v. Kanoo-Colanoo Pulia*] - - - - - 359

LEASE.

A lease for seven years of a farmed *pergunna* in *Bengal*, was granted by the *Raja* of *Burdwan*. The lease was not executed in writing, but the terms of holding were defined by a notice sent by the *Raja* to the tenants of the premises. The lessee died before the termination of the demised term, when the lessor evicted the lessee's representatives, and granted a fresh lease to another, at an increased rent. Held, in a suit brought by the representatives of the lessee to recover compensation for loss of profits, that the act of dispossession was wrongful, the remainder of the term by the *Hindoo* law surviving to the heirs and representatives of the deceased lessee ; and damages to be paid by the lessor, calculated upon the increased rental, awarded. [*Maha-rajá Tej Chund Bahadur v. Sri Kanth Ghose*] - - - - - 261

LEGITIMACY.

See "MAHOMEDAN LAW."

LIMITATION.

1. The fact of residence at a distance of 900 miles from the place where the subject matter in dispute was situate: Held insufficient to bring a party within the exception of the *Bengal Regulations of Limitation* (III. of 1793 and II. of 1805 s. 3); the party in possession of the property being a purchaser for a valuable consideration without notice, and the Plaintiff's right of action having accrued twenty-five years before the institution of the suit. [*Sheikh Imdad Ali v. Mussumat Kootby Begum*] - - - 1

2. A claim preferred before the *Peishwa* in 1813, previous to the British rule, but upon which no adjudication was made: Held sufficient to bring the claimant within the exception of sec. 7, cl. 2, of the *Bombay Reg. of Limitation* V. 1827, notwithstanding adverse possession for thirty years previous to the institution of the suit. [*Jewa Jee v. Trimbuk-jee*] - - - 138

MADRAS REGULATIONS.

See "CASTE."

"EVIDENCE."

"PLEADING."

MAHOMEDAN LAW.

1. By the Mahomedan Law, a child born in wedlock is presumed to be the child of the father; legitimacy following the marriage bed.
A Mahomedan, by deed, declared that

he had adopted a son "who was to succeed to his property and title." Held on Appeal, to be inoperative and void, either as a deed of gift, or as a testamentary disposition, no delivery of possession and relinquishment by the donor, or seisin by the donee having taken place. [*Jeswunt Sing-jee Ubbby Sing-jee v. Jet Sing-jee Ubbby Sing-jee*] - 245

2. By the Mahomedan law, continual cohabitation and acknowledgment of parentage, is presumptive evidence of marriage and legitimacy. [*Khajah Hidayut Oollah v. Rai Jan Khanum*] - - - - - 295

NEXT FRIEND.

See "OFFICER OF THE COURT."

ORDER IN COUNCIL (Appeal under).

See "PRACTICE," 3.

(Variation of).

See "PRACTICE," 5.

OFFICER OF THE COURT.

By a general Order made on the Equity side of the Supreme Court of *Madras*, it was ordered that "Whenever it shall appear, that the property of any infant is unprotected, and not secured for his or her benefit, the Registrar shall, with the previous consent of the Court, or a Judge, institute proceedings on behalf of such infant,

for the purpose of protecting his or her person or property." In pursuance of this Order, the Registrar of the Supreme Court, upon Petition, obtained an Order, giving him liberty to file a Bill in the Equity side of the Supreme Court, as the next friend, and on behalf of infants, for an account of the estate of their father, who died intestate, against their mother, the Administratrix; and notwithstanding an Appeal against such Order, such Bill was filed, to which the Defendant put in a plea, which being overruled, a further Appeal from such decision was interposed to Her Majesty in Council.

By the practice of the Supreme Court, the Registrar is entitled to a commission of 5 per cent. on all sums of money paid into Court.

Held by the Judicial Committee, that the Order of the Equity side of the Supreme Court, being made under the general jurisdiction of the Supreme Court, and not under the Statute 2 & 3 Vict., c. 34, was void, it being against public policy to allow an officer of the Court to institute suits, in the conduct of which he might have a direct personal interest, and the Orders made in pursuance thereof, reversed. [*Kerakoose v. Serle and others*] 329

PARTIES.

Decree for an account of dealings and transactions of a deceased partner in an Hindoo family bank, and for a dissolution of the partnership, reversed, on the ground that the re-

spective rights of the parties were not sufficiently defined and declared, and that the Decree, under any circumstances, was erroneous, being made without the heir or legal representative of the deceased partner being a party to the suit. [*Baboo Janokey Doss v. Bindabun Doss*]

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PARTNERSHIP, HINDOO.

See "PARTIES."

PLEADING.

In a suit for possession of *zemindary*, the Plaintiff's title depended upon the fact of a division having taken place between the family. No averment of such division was made in the plaint, nor did the Courts in *India*, as required by the *Madras Regulation XV. of 1816, sec. 10*, make it a point to be established, though some evidence was given of the fact. Held on appeal, that there had been a miscarriage, the conditions of the Regulation being imperative, and the Decree of the *Sudder Dewanny Adawlut* reversed. But, as the parties had acted under a misapprehension of the Regulation, leave was given to institute a fresh suit within three years. [*Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver v. Rany Anga Moottoo Nat-chiar*] - - - - - 278

See "CASTE."

"PARTIES."

PREROGATIVE OF THE CROWN.

See "APPEAL," 3, 4.

PRACTICE.

1. Evidence tendered to the *Sudder* Court, on a Petition for review, which was refused, and the order of refusal not appealed from, though forming part of the transcript, cannot be referred to in the argument upon the Appeal from the original Judgment. [*Sheikh Imdad Ali v. Mussumat Kootby Begum*] - - 1
2. There being two sets of Appellants, having separate interests and adverse claims against each other, as well as against the Respondents, the Judicial Committee permitted two counsel to be heard for each set of Appellants. [*Jewa-jee v. Trimbuk-jee*] - - - - 138
3. Leave to Appeal granted, on payment of costs, from an Order of the *Sudder* Court at *Bombay*, decreeing interest upon the amount awarded by the Judgment of the Court; the Appellant having failed to apply to the Court in *India*, within six months, as required by the Order in Council of the 10th April 1838. [*Kirkland v. Moodee Peston-jee Khoorsed-jee*] - - - - 220
4. This Court will not entertain a technical objection which was not taken in the Court below, where it might have been amended. [*Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*] - - - 229
5. Under an order of reference, the Judicial Committee of the Privy Council, upon an Appeal coming before them, remitted the case, by reason of the rejection of certain evidence, to the Court below, with directions to take the evidence re-

jected. The Court in *India*, upon the remit, examined such of the witnesses before tendered as were produced, but made no adjudication in the cause, and transmitted the further evidence to *England*. No fresh order of reference was made to the Judicial Committee. Upon the Appeal, with the further evidence coming before them, their Lordships, under the circumstances, were of opinion that they had no jurisdiction to entertain the case, the original order of reference having been exhausted by the remit.

But upon a Special Petition for such purpose (all parties consenting) the Order in Council directing the remit to *India* was varied and amended, by being made a mere reference to the *Sudder Dewanny Adawlut* to take evidence, without throwing any duty upon that Court to reconsider or adjudicate upon the cause, but to remit the same, for the consideration of the Lords of the Committee. [*Jeswunt Sing-jee Ubby Sing-jee v. Jet Sing-jee Ubby Sing-jee*] - - - - 245

6. This Court will not act as a Court of original jurisdiction. Therefore, Where the Judge of the Court below improperly suppressed documents, which were not discovered until after the transmission of the Appeal to Her Majesty in Council, their Lordships refused to give an opinion on the merits, and remitted the cause to the *Sudder Dewanny* Court for reconsideration. [*Juveer-bhaee v. Vuruj-bhaee*] - 324
7. This Court will not encourage a

mere objection of form, that does not affect the substantial merits of the case. [*The Mokuddims of Kun-kunwaddy v. The Enamdar Brahmins of Soorpal*] - - - 383

PRINCIPAL AND SURETY.

A. drew five Bills in favour of B. on *Fergusson & Co.*, who accepted the same, and got them discounted by the Bank of *Bengal*, and, on their becoming due, procured their renewal. *Fergusson & Co.* subsequently drew three Bills on the Bank of *Bengal*; and, for securing as well the repayment of the principal sum due on these Bills and interest, as of all and every sum or sums which the Bank had already advanced or should advance on account of the drawers, deposited as collateral securities various quantities of *Chili* copper, of a larger amount in value than the advances then made. By a condition in these Bills, the Bank were authorised, in default of payment within the time stipulated, to dispose of the copper by public or private sale, and to reimburse themselves the principal and interest due thereon. Shortly afterwards, *Fergusson & Co.* failed, and assignees of their estate and effects were appointed under the Indian Insolvent Act. On presentation to A. of the first of the renewed Bills, he served notice on the Bank not to part with the securities so deposited with them, alleging that the Bills drawn and renewed by him were accom-

modation bills, for which he had not received any consideration, and were renewed on the faith of the securities being applicable to their discharge. The assignees of *Fergusson & Co.* redeemed the copper by paying to the Bank the amount of the principal and interest due upon the Bills drawn by *Fergusson & Co.* All the Bills drawn by A. were dishonoured, and the Bank of *Bengal* brought an action against A. for their amount. On a Bill filed by A., the Bank were restrained by Injunction from proceeding with the action at law. Held on Appeal by the Judicial Committee discharging the injunction and reversing the Decree of the Supreme Court, that, under the circumstances, the redemption of the securities was a sale within the meaning of the condition contained in the deposit Bills, and that such sale was not a release to A. as surety for the previous Bills, the condition not being that the copper or the proceeds thereof should be applied preferentially or *pari passu* with the other debts, but simply in reimbursement to the Bank, of the principal and interest due upon the Bills. [*The Bank of Bengal v. Radakissen Mitter*] - - - 19

PRIVY COUNCIL.

See "JURISDICTION," 2.

"PRACTICE," 5, 6.

PUBLIC POLICY.

See "ASSIGNMENT."

"PUBLIC OFFICER."

REGULATIONS.

See "LIMITATION."

"PLEADING."

"SALE."

RELIGIOUS CEREMONIES.

See "CASTE."

"ACTION," 2.

REMAINDER OF TERM OF
LEASE.

See "LEASE."

REPRESENTATIVES.

See "ASSIGNMENT."

"LEASE."

REVENUE.

See "SALES."

SALES.

1. A *talook*, consisting of 210 villages, but classed under the decennial settlement, for fiscal purposes, as 74 villages, and assessed as 74 separate *sudder jummas*, was sold by public auction by the Collector, in one lot, for arrears of Government revenue, at a sum greatly disproportionate to its value. The sale was made by order of the Board of Revenue, but it did not appear that the Collector had informed the Board that the *talook* consisted of 74 villages, or that the Board had authorized the sale in one specific lot. The Board subsequently confirmed the sale. The surplus of the purchase-money, after satisfying the Government arrears, was received and appropriated by the *Malguzar*. On a

suit by the *Malguzar* against the purchasers, to annul the sale, it was held by the Judicial Committee affirming the Decree of the Court below:—

I. That the act of the Collector, in putting up for sale, and consolidating the 74 villages as one lot, without the express authority of the Board of Revenue for the sale of such specific lot, was contrary to the Regulations, and illegal, and was not cured by the general authority given previous to the sale, or by the subsequent confirmation thereof by the Board.

II. That the sale being unauthorized, no implied adoption by the subsequent appropriation of the purchase-money could bar the *Malguzar* from reclaiming the estate, on the restoration of the purchase-money.

III. That the retrospective operations of Reg. XI. 1822, did not apply to a sale so circumstanced as this; it being provided by clause 3 of sec. 6, that in order to prevent the sale being annulled, the Board of Revenue shall have actually given authority to proceed to the sale of the specific lot.

But the Courts in *India* having proceeded on the footing that the purchaser had been repaid, during the time he was in possession, by the perception of the rents and profits of the *Zemindary*, did not direct the *Malguzar* to refund the purchase-money, or call for an account of the mesne profits. Such part of the Decree of the Court be-

low reversed, and an account directed to be taken in *India*, of the rents and profits received by the purchaser, giving credit for permanent improvements on the estate; and as the purchasers were not responsible for the illegality of the sale, so much of the Decree of both Courts below, as condemned them in costs, reversed, and both parties ordered to pay their own costs, in the Courts in *India* and in this country. [*Maha-rajah Mitterjeet Sing v. The heirs of Ranee Juswunt Sing*] - - - - 42

2. A sale in 1802, of lands in *Allahabad*, for arrears of Government revenue, set aside by the *Mofussil* and *Sudder* Commissioners, constituted under Reg. I. of 1821, although no suit brought to annul the sale until the year 1821. Affirmed on Appeal by the Judicial Committee.

But the sale having taken place by the direction of the Government, and there being no fraud on the part of the purchaser, the Judicial Committee, under clause 2, sec. 4, of Reg. I. of 1821, awarded the purchaser compensation, to be paid by the Government. [*Maha-rajah Ishuree Persad Narain Sing v. Lal Chatterput Sing*] - - - - 100

SHERIFF.

A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance by the outer door, but before he could make an actual arrest, was forcibly expelled from the house, and the outer door fas-

tened against him. The officer obtained assistance, broke open the outer door, and made the arrest. Held that the officer was justified in so doing.

Held also, that demand of re-entry, under such circumstances, was not requisite to justify his breaking open the outer door.

Quære. If indictment for an assault and false imprisonment will, under such circumstances, lie against the sheriff's officer. [*Aga Kurboolie Mahomed v. The Queen*]

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STOPPAGE IN TRANSITU.

Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprized the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at *Bombay*), that trover would not lie for the goods, for that, on their delivery on board the vessel, they were no longer *in transitu*, so as to

be stopped by the sellers ; and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. [*Cowas-jee v. Thompson*] - - - - 422

SURETY.

See "PRINCIPAL AND SURETY."

UNDIVIDED HINDOO FAMILY.

See "COPARCENARY."

VENDOR AND VENDEE.

See "BOUGHT AND SOLD NOTES."

"STOPPAGE IN TRANSITU."

WIDOW.

See "ADOPTION."

WILL.

The 7th section of the Indian Will Act, No. 25, of 1838, enacts "that no Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the Testator or by some other person in his pre-

sence, and by his direction, and such signature shall be made, or acknowledged, by the Testator, in the presence of two or more witnesses, present at the same time ; and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary."

A Testator signed his Will in the presence of a witness, who subscribed it in his presence ; and some time afterwards, upon the arrival of another witness, the Testator, in the joint presence of the former witness, and the other subscribing witness, acknowledged his subscription at the foot of the Will. The second witness then subscribed the Will, and the first witness, in his and the Testator's presence, acknowledged his subscription, but did not re-subscribe.

Held by the Judicial Committee (affirming the sentence of the Supreme Court at *Calcutta*), that the requirements of the Act had not been sufficiently complied with ; it being necessary that both witnesses should be jointly present at the same act of the Testator, and jointly subscribe it in his presence. [*Case-ment v. Fulton*] - - - - 395